Supreme Court, U.S.
FILED

No. 01397 MAR - 7 2001

In the Supreme Court of the United States

UAL CORPORATION, DBA UNITED AIRLINES,

Petitioner,

v.

JOANNE FIELDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in conflict with every other circuit that has considered the question, that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal antidiscrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "related closely enough" to the otherwise time-barred claims.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. UAL Corporation, a Delaware corporation, dba United Airlines, defendant-appellee; and

2. Joanne Fielder, plaintiff-appellant.

Petitioner UAL Corporation is a publicly traded company. The following companies each own 10% or more of the corporation's common stock: State Street Bank and Trust Company; and, collectively, AXA Conseil Vie Assurance Mutuelle, AXA Assurances I.A.R.D. Mutuelle & AXA Assurances Vie Mutuelle, AXA Courtage Assurance Mutuelle, AXA, and AXA Financial, Inc.. UAL Corporation does business as United Airlines through its wholly owned subsidiary United Air Lines, Inc. Neither UAL Corporation nor United Air Lines, Inc., has any subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

UAL Corporation, dba United Airlines, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 218 F.3d 973. The order of the court of appeals denying rehearing and rehearing en banc (App., *infra*, 53a-54a) is unreported. The district court's opinion granting summary judgment to petitioner (App., *infra*, 55a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2000. App., *infra*, 1a. A petition for rehearing and rehearing en banc was denied on November 7, 2000. App., *infra*, 53a-54a. On January 19, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

Title VII of the Civil Rights Act of 1964 prohibits not only economic discrimination but also all other forms of disparate treatment based on an employee's membership in a protected class. See *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986). Sexual harassment or discriminatory intimidation can give rise to liability under Title VII if it becomes sufficiently severe or pervasive to alter the conditions of the victim's employment. *Id.* at 67.

Although this Court's Title VII decisions have clarified the types of conduct that the statute renders unlawful, confusion abounds in the lower courts regarding the proper application of Title VII's short limitations period. To preserve a Title VII claim, an aggrieved employee must submit a charge of discrimination to the EEOC within 180 days of the incident, or within 300 days of the incident if the employee first presents the charge to a state or local equal opportunity agency. See 42 U.S.C. § 2000e-5(e)(1). Despite the absence of any exception to this requirement in the statute, the courts of appeals have each recognized some variant of a "continuing violation" doctrine that allows, under certain circumstances, time-barred Title VII claims to be joined with related claims that were the subject of a timely EEOC charge. The divergent rules that now exist in the lower courts share a common name but are otherwise incapable of reconciliation. See T.A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1175 (1988) (observing that "[a]pplication of the continuing violation theory to specific employment policies and practices varies among and within circuits, making it difficult to categorize the approaches used by courts").

The most widely followed approach is that of the Fifth Circuit, which permits untimely sexual harassment incidents to be linked to timely incidents if the nature of the harassment is similar, if the unlawful acts are of a recurring nature, and if the untimely acts did not have the degree of permanence necessary

to trigger the employee's awareness that a Title VII violation occurred. See *Berry* v. *Board of Supervisors of La. State Univ.*, 715 F.2d 971, 981-982 (5th Cir. 1983). The majority of the divided panel of the Ninth Circuit below expressly rejected the application of the *Berry* test in sexual harassment and hostile work environment cases, holding that plaintiffs in these cases may invoke the continuing violation doctrine merely by demonstrating that the timely and untimely incidents are "related closely enough."

A. Fielder's Employment at United

1. Fielder began working for United in 1978 as a part-time customer service agent at the Medford, Oregon, airport. App., *infra*, 56a. Her general duties included flight preparation, handling of baggage, taking reservations, and issuing seat assignments. *Ibid.* She worked without incident through 1981, and then took a three-year furlough. *Ibid.*

Fielder testified that, after she returned from her furlough in June 1984, some of the other customer service agents began to sexually harass her. App., *infra*, 56a.[1] She alleged that, on one occasion, a condom was placed in her mailbox. From time to time, a number of her male colleagues allegedly told her that it was her role as a woman to bear children. According to Fielder, her colleagues would occasionally leave pornographic magazines, open to the centerfold, in her desk drawer. In addition, Fielder claimed that her coworkers began to address her by the nickname "Buns." The harassment allegedly continued through February 1993, and in April 1994, Fielder requested and was granted a medical leave of absence. *Ibid.*

During her deposition, Fielder identified Mark Chmelir and Stan Reynolds as her principal antagonists. App., *infra*, 57a.

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[1] The court below and the district court accepted Fielder's statement of facts for purposes of resolving United's motion for summary judgment. United will dispute many, if not all, of these factual assertions if this case proceeds to trial.

Chmelir allegedly began to harass Fielder at some point before 1991. *Id.* at 3a. She testified that Chmelir frequently touched her shoulder, back, arms, and hips while she was working. *Id.* at 57a. Fielder alleges that she advised Chmelir in 1991 that his conduct was unwelcome and that she would take legal action if he continued it. Despite that warning, she testified, Chmelir was undeterred. *Id.* at 3a. On one occasion in or about 1991, Chmelir allegedly pinned Fielder against a departure board with his rear end and wiggled himself against her. *Id.* at 58a.

Between mid-1992 and February 1993, Fielder claimed that she received three obscene phone calls at home. App., *infra*, 4a, 58a. On February 13, 1993, Chmelir allegedly approached her at work and asked her if she would go to bed with him. *Id.* at 3a. That night, during the last of the obscene calls, the male caller inquired whether Fielder was naked and said that he wanted to "eat" her. *Id.* at 4a. Fielder reported the phone calls to the police, and on February 18, 1993, she complained to her supervisor, Ted Bibler, that Chmelir had sexually harassed her by touching her and by placing the obscene phone calls. *Id.* at 58a.

Bibler convened a meeting with Chmelir and Fielder, in which Chmelir denied that he had placed the obscene phone calls. App., *infra*, 4a, 58a. Chmelir later confessed, however, that he was the caller, and he entered into a criminal diversion agreement in July 1993. *Id.* at 4a. Bibler issued a final written warning to Chmelir, and as a condition of his criminal diversion agreement Chmelir was not allowed to work on the same shift as Fielder. *Id.* at 61a.

Fielder testified that Stan Reynolds also harassed her on several occasions before 1992. App., *infra*, 6a-7a, 57a-58a. Reynolds allegedly made disparaging comments about women generally, their anatomy, and his desires toward them, including vulgar remarks like "great boobs." *Id.* at 57a. Fielder did not contend that Reynolds harassed her in or after 1992.

2. Fielder did not claim to have experienced any sexual harassment at all after February 1993, App., *infra*, 71a, but she

did contend that several of her coworkers, including Reynolds, retaliated against her for reporting Chmelir to Bibler and to the police, *id.* at 6a, 59a. She alleged that Reynolds retaliated against her by withholding his assistance during certain physically strenuous tasks, such as unloading heavy cargo. *Id.* at 6a-7a, 59a. Other coworkers allegedly shunned her. *Id.* at 6a, 59a. On one occasion, Fielder claims that someone stepped on her coat and left a muddy footprint. *Ibid.* According to Fielder, her intermediate supervisor, Ron Mailho, made vulgar and derogatory comments to her. *Id.* at 61a.

In or about the spring of 1993, Fielder allegedly requested a transfer to another United station in Portland or Seattle. App., *infra*, 8a, 61a. She claimed that she renewed this request during a training seminar in August 1993, but she apparently did not raise the possibility of a transfer again, and she remained at the Medford station through the next six months. *Id.* at 60a-62a. In April 1994, Fielder allegedly became concerned that Chmelir might attempt to bid onto her shift once his criminal diversion agreement expired. She claims that she discussed this concern with Bibler, seeking his assurance that Chmelir would be denied access to the same shifts that she was working. *Id.* at 62a-63a. According to Fielder, Bibler could not give her this assurance because he believed that there was no legal or policy basis for denying Chmelir the right to bid for particular shifts based on his seniority level. *Id.* at 63a. Fielder testified that she took a medical leave of absence on April 20, 1994 to avoid the possibility of coming into contact with Chmelir again. *Id.* at 62a.

Fielder alleged only two instances of unfair treatment after she began her leave of absence in April 1994. First, she claimed that, during her absence, another customer service agent who had less seniority than she received a transfer to Seattle in the Fall of 1994. App., *infra*, 14a-15a, 64a. The employee who received the transfer, like Fielder, had complained to Bibler of being sexually harassed by Chmelir. *Id.* at 33a. Second, she alleged that she received a reprimand from Bibler when she escorted her mother onto a United flight on September 1, 1994.

Id. at 63a. Fielder testified that one of her coworkers approached her on the plane and told her that Bibler wanted to speak with her in his office. When she went to Bibler's office, he allegedly closed the door and told her that "her presence at the airport was causing upheaval among her co-workers, and that she showed poor judgment in coming out to the airport at all" because she was on medical leave. *Ibid.*

3. As her deposition testimony confirms, Fielder recognized early on that the alleged conduct of her coworkers could be grounds for legal action. Indeed, in 1992, she told the employees who she believed had harassed her that their "prior behavior was unacceptable; [that] it would not [sic] longer be tolerated; *that it constituted sexual harassment*; and that if it wasn't stopped she would consult an attorney." App., *infra*, 58a (emphasis added). Fielder complained to her supervisor Bibler in February 1993 and then did consult an attorney in or about March 1993. *Id.* at 4a-5a, 58a. By letter dated March 11, 1993, Fielder's attorney alleged that Fielder had suffered "direct or indirect retaliation" at the hands of her coworkers, and he advised United that it had an obligation to protect her from further acts of retaliation. *Id.* at 7a n.5. The same attorney wrote two more letters in June 1993 and September 1993, again complaining about alleged instances of retaliation against Fielder. *Id.* at 7a.

Although Fielder appreciated the unlawful nature of her coworkers' alleged acts as early as 1992, and although her attorney formed the same assessment no later than March 1993, Fielder did not file a charge of discrimination with the Oregon State Bureau of Labor and Industries until May 9, 1995 (the same day she resigned from her employment). App., *infra*, 64a. At that point, only two events fell within the 300-day limitations period prescribed by Section 706(e): the transfer of another customer service agent and Fielder's alleged reprimand for escorting her mother onto a flight. *Id.* at 21a-24a.

B. Proceedings Below

The district court granted petitioner summary judgment on the ground that Fielder had not alleged any incidents of sexual harassment or retaliation that fell within the 300 days preceding her administrative charge of discrimination. App., *infra*, 55a-73a. The court examined the only two allegations that came within the 300-day window: the transfer that went to one of Fielder's coworkers, who also had complained to Bibler of being sexually harassed by Chmelir, and the oral reprimand that Fielder allegedly received from Bibler after escorting her mother onto a plane. *Id.* at 66a, 71a-73a. The court concluded that petitioner did not sexually harass Fielder or retaliate against her by approving the coworker's transfer request. *Id.* at 71a. As the district court recognized, Fielder was already on leave when the other employee was transferred, and thus petitioner "did not have any opportunity to act on [Fielder's] request after plaintiff left work on April 20, 1994." *Ibid.*

The district court also determined that the alleged reprimand from Bibler, standing alone, did not constitute a violation of Title VII. As the court explained, the reprimand, if it occurred, was not sexual harassment because it was not a sexual advance, a request for sexual favors, or some other type of verbal or physical conduct of a sexual nature. *Id.* at 70a-71a. Moreover, the alleged reprimand was not cognizable as an act of retaliation because, even if Bibler's motive was retaliatory, the single reprimand was not sufficiently severe or pervasive to alter the terms and conditions of Fielder's employment. *Id.* at 73a. In other words, the alleged reprimand simply was not an "adverse employment action." *Ibid.*

In response to Fielder's claim that the continuing violation doctrine allowed her to recover for alleged incidents dating back to 1984, the district court turned to the three *Berry* factors. App., *infra*, 67a. In the district court's formulation, the existence of a continuing violation turned on (1) whether the timely and untimely acts involve the same type of discrimination; (2) whether the acts were recurring, or merely isolated

employment decisions; and (3) whether the acts had the degree of permanence that should trigger an employee's awareness of and duty to assert her rights. *Ibid.*

The court correctly noted that the third factor is generally considered the most important because it goes to the essential purpose of the continuing violation theory, which is to "permit the inclusion of [untimely] acts whose character as discriminatory acts was not apparent at the time they occurred." App., *infra*, 67a. (citing cases). As the district court explained, a plaintiff who contemporaneously recognizes that discrimination is occurring cannot rely on the continuing violation doctrine to overcome Title VII's limitation period. *Id.* at 67a-68a. To the contrary, a "claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the (300) day limitation period." *Id.* at 68a. The district court concluded that Fielder's time-barred claims fell in the latter category because she believed before the running of the limitations period that she had experienced sexual harassment and retaliation, yet she did not promptly file a discrimination charge with the appropriate agency. *Id.* at 72a-73a.

A sharply divided panel of the court of appeals reversed, holding that the lower court had erroneously relied on the *Berry* analysis to reject Fielder's invocation of the continuing violation theory. App., *infra*, 16a-26a. The majority distinguished *Berry* as an "equal pay" gender discrimination case, concluding that the *Berry* analysis "is [not] properly suited for [ ] hostile work environment [cases]" or for sexual harassment cases. *Id.* at 24a-25a. Citing its own decisions in *Draper* v. *Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998), and *Green* v. *Los Angeles County Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989), the majority held that the relevant inquiry in sexual harassment and hostile work environment cases is whether the "alleged discriminatory acts are related closely enough to constitute a continuing violation." App., *infra*, 25a-26a. Applying this test to Fielder's allegations, the majority

determined that the transfer of another employee and the alleged oral reprimand from Bibler during the limitations period were "so closely related to the acts of [sexual harassment] and retaliation previously experienced by Ms. Fielder as to trigger the operation of a continuing violation theory." *Id.* at 26a.

In a lengthy dissent, Judge Kleinfeld criticized the panel majority for adopting a continuing violation test that "effectively eliminates the statute of limitations on sex discrimination cases." App., *infra*, 30a. Judge Kleinfeld sympathized with the majority's anger at the manner in which Fielder's coworkers had allegedly treated her in 1992 and 1993, and he did not dispute that Fielder's allegations regarding that period, had they been the subject of a timely administrative charge, would have been sufficient to ward off summary judgment. *Id.* at 30a-32a. However, he cautioned that the desire to provide a remedy for those stale claims could not trump the 300-day statute of limitations established by Congress. *Id.* at 32. Judge Kleinfeld pointed to Fielder's testimony that the unwelcome sexual conduct stopped completely in February 1993. *Id.* at 31a. Thus, he found no support in the record for the majority's conclusion that the alleged misconduct continued into the limitations period, such that Fielder should have been permitted to rely on the continuing violation theory. As Judge Kleinfeld observed, Fielder "did not work a single day during the 300 day [limitations] period, so there was not even an opportunity for sexual harassment or employer retaliation to take place, let alone evidence that any did." *Id.* at 31a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to clarify the circumstances (if any) in which alleged Title VII violations that were not the subject of a timely administrative charge may be joined with claims that were the subject of a timely charge in a private lawsuit under Title VII. The Ninth Circuit has adopted an inscrutable standard, permitting timely and untimely claims to be linked together whenever, in a particular case, the court deems them to be "related closely enough." The court applied

that rule here, holding that respondent could resuscitate an assortment of time-barred claims under a continuing violation theory even though no similar Tile VII violation occurred within the limitations period, and notwithstanding respondent's failure to submit a timely administrative charge regarding what she believed at the time was unlawful conduct by her coworkers. As Judge Kleinfeld pointed out in his dissent below, the practical consequence of this rule is to "keep alive incidents of claimed sexual harassment permanently, with no statute of limitations at all." App., *infra*, 30a.

The panel decision is at odds with the decisions of other circuits, without support in the language of the statute, and inconsistent with this Court's guidance regarding the enforcement of Title VII's limitations period. Further review is warranted.

I. THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH OTHER CIRCUITS' NARROW APPROACHES TO THE CONTINUING VIOLATION DOCTRINE

Roughly six years after Title VII was enacted, courts began to question whether the statute's bright-line limitations period could be tolled in appropriate cases under a continuing violation theory. See, *e.g.*, *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 487 n.20 (7th Cir. 1970) (recognizing that plaintiffs who fail to file a timely EEOC charge will be left without a remedy under Title VII unless a continuing violation theory is allowed). In the past 30 years, numerous appellate and district court decisions have revisited this question, and commentators have scrutinized the advantages and the weaknesses of the many conflicting and irreconcilable variants of the continuing violation doctrine. See R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 AM. BUS. L. J. 365, 382-383 (1993) ("Because of limited guidance from the U.S. Supreme Court, the federal circuits have adopted different standards for implementing the continuing violation doctrine."); 2 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINA-

TION LAW 1351 (3d ed. 1996) (the continuing violation concept has "provoked endless confusion"); R.J. Reid, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. CIN. L. REV. 1335, 1347 (1992) ("application of the theory to specific employment discrimination cases remains difficult to predict within and among the circuits"); Crivens, *supra*, 41 VAND. L. REV. at 1172 (the doctrine is "considered to be one of the most confusing theories in employment discrimination law"); C.C. Jackson & J.H. Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811, 812 (1979) ("courts have rendered inconsistent and often irreconcilable decisions," due in part to the "willingness of some courts to breathe life into claims that technically do not meet the [administrative] filing requirement").

What little consensus there was among the courts of appeals has been shattered by the Ninth Circuit's insistence on adopting an approach that is followed in no other circuit. Review by this Court is necessary to establish uniformity in the application of the continuing violation doctrine.

A. The decision below, as the panel majority acknowledged in its opinion, is in direct conflict with *Berry*, 715 F.2d at 979-980, and its progeny. In that case, the Fifth Circuit held that three factors should be considered before a Title VII plaintiff is permitted to invoke the continuing violation theory. First, the district court should determine whether the timely and untimely allegations involve the *same type of discrimination*, such that it would be reasonable to view them as a series of continuous violations constituting an "organized scheme" of discrimination. *Id.* at 981. Second, the court should assess whether the alleged conduct occurred with sufficient *frequency* that the discrete acts can be viewed as part of a course of conduct. See *ibid.* The third factor, described by the *Berry* court as the most important, is whether the early, untimely incidents had the "degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights." *Ibid.*

Although the Ninth Circuit distinguished *Berry* on the ground that it was an equal pay and gender discrimination case, the Fifth Circuit has confirmed that the *Berry* factors are equally applicable to harassment and hostile work environment claims like the one asserted by respondent in this case. See, *e.g.*, *Estate of Martineau* v. *Arco Chem. Co.*, 203 F.3d 904, 912-913 (5th Cir. 2000); *Huckabay* v. *Moore*, 142 F.3d 233, 238-239 (5th Cir. 1998); *Webb* v. *Cardiothoracic Surgery Assocs. of N. Tex., P.A.*, 139 F.3d 532, 537 (5th Cir. 1998). The *Webb* case in particular demonstrates the depth of the conflict between the decision below and the Fifth Circuit's analysis. The plaintiff in *Webb* worked as a secretary, and later as an office manager, for a medical practice. 139 F.3d at 534. She alleged that one of the surgeons began sexually harassing her in the spring of 1991. Initially, the harassment consisted of touching the plaintiff on her shoulder and brushing up against her — contacts that the plaintiff did not immediately consider to be sexual or offensive. *Id.* at 535. In January 1993, during a business meeting, however, the surgeon hugged the plaintiff, invited her to come to his hotel room in the evening, and telephoned her when she did not stop by. The following month, the surgeon reached under the plaintiff's skirt and touched her thigh. In the fall of 1993, the plaintiff became the office manager of the practice and had less frequent contact with the surgeon. During those interactions, the surgeon was rude to her, belittling her in front of patients and other employees, and on one occasion throwing a magazine at the plaintiff's feet. The plaintiff resigned after this incident and filed an EEOC charge on July 18, 1995. *Id.* at 535-536.

The district court held that the sexual contacts between 1991 and 1993 could not be included in the plaintiff's Title VII claim under a continuing violation theory. 139 F.3d at 537. The first *Berry* factor favored the plaintiff; she experienced sexual harassment and other unpleasantries both before and within the limitations period, and all the offensive conduct was perpetrated by the same harasser. However, the third factor, the degree of permanence, weighed heavily against the plaintiff, in the district court's view. Although the court credited the plain-

tiff's testimony that she did not immediately appreciate that the surgeon's physical contacts were inappropriate, the court resolved that the incidents in January and February 1993 were sufficient "to put [the plaintiff] on notice that she was a victim of sexual harassment without the necessity of learning additional facts." *Ibid.* Hence, the continuing violation doctrine was held to be inapplicable. The Fifth Circuit affirmed, agreeing with the district court's analysis of the *Berry* factors. *Id.* at 537-538.

The conflict between *Webb* and the decision below is inescapable. Of the two cases, *Webb* presented a far more compelling basis for invoking the continuing violation theory, yet the Fifth Circuit held that it did not apply. Unlike the plaintiff in *Webb*, who complained about sexual harassment and hostile treatment both before and during the limitations period, Fielder complained principally about sexual harassment, and to a lesser extent coworker retaliation, before the limitations period, but complained only about the transfer of a coworker and one incident she characterizes as *retaliation* (Bibler's reprimand) that allegedly occurred within the limitations period. Whereas the *Webb* plaintiff's timely and untimely allegations all involved the same supervisor, Fielder complained about sexual harassment by Chmelir and Reynolds outside the limitations period, while the two timely allegations both involved her supervisor, Bibler, who was not alleged to have harassed Fielder ever or to have retaliated against her within the limitations period. To the contrary, Bibler was the supervisor who issued a final written warning to Chmelir, and who encouraged Fielder to report his conduct to the police. App., *infra*, 31a, 58a, 61a. Unlike the plaintiff in *Webb*, who apparently did not appreciate during the limitations period that her supervisor's behavior might be violative of Title VII, Fielder specifically complained of sexual harassment to both her coworkers and her supervisor Bibler long before the limitations period ran. *Id.* at 58a. Shortly thereafter, Fielder retained an attorney, who advised United during the limitations period that he believed Fielder was being retaliated against. *Id.* at 4a-5a, 7a.

Although the majority below, applying the one-factor test from its *Green* and *Draper* decisions, concluded that Fielder's untimely sexual harassment and retaliation allegations were "related closely enough" to her timely sex discrimination and retaliation allegations against Bibler, the Fifth Circuit and the other circuits that follow *Berry* would have reached the opposite result. Moreover, as the Ninth Circuit itself recognized in a subsequent decision, Fielder could not have invoked the continuing violation theory in a *Berry* jurisdiction because "the harassing behavior [Fielder complained of] was such that a reasonable person would have been on notice that her rights were violated." *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008, 1015 (9th Cir. 2000). In *Morgan*, the Ninth Circuit expressly acknowledged the conflict with *Berry* but reaffirmed its adherence to the "related closely enough" test applied in *Fielder* and previous decisions. *Id.* at 1014-1015.

The Fifth Circuit is equally committed to the *Berry* three-factor test, as shown by its decisions in *Estate of Martineau*, *Huckabay*, *Webb*, and other cases. Furthermore, *Berry* has been widely followed by other circuits as the benchmark for determining whether a continuing violation exists in Title VII discrimination, retaliation, harassment, and hostile work environment cases. The Third, Sixth, Tenth, and Eleventh Circuits have applied the *Berry* factors in the same manner as the Fifth Circuit, placing particular emphasis on the third factor — whether the degree of permanence was sufficient to put the plaintiff on notice of her duty to prosecute her claim. See *Roberts* v. *Gadsden Mem. Hosp.*, 835 F.2d 793, 801 (11th Cir. 1988); *Bell* v. *Chesapeake & Oh. Ry. Co.*, 929 F.2d 220, 223 (6th Cir. 1991); *Purrington* v. *University of Utah*, 996 F.2d 1025, 1028-1029 (10th Cir. 1993); *Martin* v. *Nannie & Newborns, Inc.*, 3 F.3d 1410, 1416 (10th Cir. 1993); *West* v. *Philadelphia Elec. Co.*, 45 F.3d 744, 755 n.9 (3d Cir. 1995); *Rush* v. *Scott Specialty Gases, Inc.*, 113 F.3d 476, 482 (3d Cir. 1997). The District Court for the District of Columbia has also applied the *Berry* analysis, see *Villines* v. *United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 999 F. Supp. 97, 102 (D.D.C. 1998), and the District of

Columbia Circuit has cited *Berry* with approval, see *Curry* v. *District of Columbia*, 195 F.3d 654, 661 n.14 (D.C. Cir. 1999), cert. denied, 120 S. Ct. 2219 (2000).[2]

B. The *Berry* three-factor approach discussed above is not the only test in use that is fundamentally inconsistent with the Ninth Circuit's "related closely enough" test. The First and Seventh Circuits, and the Federal Circuit in a related context, have each effectively boiled *Berry* down to a one-factor test that permits the continuing violation doctrine to be invoked only if a reasonable person in the plaintiff's position would not have immediately appreciated the unlawful nature of the conduct antedating the limitations period. See *O'Rourke* v. *City of Providence*, 235 F.3d 713, 731-733 (1st Cir. 2001); *Provencher* v. *CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir. 1998); *Sabree* v. *United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 399-400 (1st Cir. 1990); *DeClue* v. *Central Ill. Light Co.*, 223 F.3d 434, 435-436 (7th Cir. 2000); *Place* v. *Abbott Labs.*,

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[2] The Second Circuit has not acknowledged the *Berry* test, but its own approach to the continuing violation theory closely parallels the three-factor *Berry* analysis. First, the court requires evidence that the same type of Title VII violation continued into the limitations period, and that the misconduct was part of a policy or practice that the employer maintained, or at least failed to remedy on learning of it. Under this prong, harassment by two different supervisors will not support a continuing violation claim if there is no evidence that they acted in concert. See *Cruz* v. *Coach Stores, Inc.*, 202 F.3d 560, 569 n.4 (2d Cir. 2000) (rejecting continuing violation claim because there was no evidence that the harassing behavior of two supervisors "was related in any way other than to be similarly offensive"). Second, the incidents must be frequent and continuous. See *Quinn* v. *Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998) (no continuing violation if the "alleged acts are sufficiently isolated in time (usually from each other, and at least from the timely allegations) as to break the asserted continuum of discrimination"). Third, the court will assess the apparent permanence of the conduct, refusing to apply the continuing violation doctrine if the plaintiff failed to file a timely EEOC charge after receiving constructive notice that a Title VII violation occurred. See *Van Zant* v. *KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) ("There is no reason to defer the accrual of [plaintiff's harassment] claim to the time she received notice of all discrete acts that might make up her discrimination claim.").

215 F.3d 803, 807-808 (7th Cir. 2000), cert. denied, 121 S. Ct. 768 (2001); *Hardin* v. *S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344-345 (7th Cir. 1999); *Garrison* v. *Burke*, 165 F.3d 565, 569-570 (7th Cir. 1999); *Galloway* v. *General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); *Bosley* v. *Merit Sys. Prot. Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (Bryson, J.).

The rationale behind this discovery rule, as Judge Posner explained for the Seventh Circuit in *Galloway*, is that sexual harassment, in its early stages, "may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable." 78 F.3d at 1166. Once the harassment becomes recognizable as such to a reasonable person, however, the victim cannot "sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one." *Garrison*, 165 F.3d at 570 (internal quotation marks omitted). Instead, the harassment victim must promptly file an EEOC charge, and one who delays in doing so will be limited to those incidents that occurred within the limitations period. *Ibid.*; accord *Provencher*, 145 F.3d at 14-15.[3]

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[3] The notice rule of the First, Seventh, and Federal Circuits is consistent with this Court's "emphatic" guidance that causes of action accrue, and the limitations period begins to run, on the plaintiff's "discovery of the injury, not discovery of the other elements of a claim." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). As the Court has explained:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the [defendant]. There are others who can tell him if he has been [legally] wronged, and he need only ask.

United States v. *Kubrick*, 444 U.S. 111, 122 (1979). Of course, respondent here would not have a timely cause of action even if claims accrued on the

Under the notice rule of the First, Seventh, and Federal Circuits, evidence that the plaintiff perceived herself to be a victim of harassment before the limitations period expired will be fatal to a continuing violation claim. See, *e.g.*, *Provencher*, 145 F.3d at 15 ("As [plaintiff] admits that he knew he was being harassed long before he brought his sexual harassment suit, and certainly had this knowledge before the statute of limitations period had run, his continuing violation claim cannot stand."); *Sabree*, 921 F.2d at 402 (commenting that the plaintiff's testimony was his own undoing because "he has admitted that he believed, at every turn, that he was being discriminated against," yet he did not file a timely EEOC charge); *Hardin*, 167 F.3d at 344-345 (rejecting continuing violation claim of plaintiff whose testimony established that she "believed she was a victim of harassment long before she filed her [administrative] complaint"). As the First Circuit explained, a "claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the [Section 706(e)] limitation period." *Sabree*, 921 F.2d at 402 (quoting *Roberts*, 850 F.2d at 1550). There is no doubt that Fielder's continuing violation claim would have failed as a matter of law if she had presented it in either the First or the Seventh Circuit. Not only did Fielder contemporaneously perceive herself to be a victim of sexual harassment, like the plaintiffs in *Provencher*, *Sabree*, and *Hardin*, but also she consulted a lawyer about her potential remedies well before the limitations period lapsed. App., *infra*, 4a-5a, 7a, 58a.

The circuit conflict created by the decision below — and the subsequent *Morgan* decision, which follows the decision below — has been openly acknowledged. The Ninth Circuit in the decision below (App., *infra*, 24a-25a) recognized the conflict with *Berry* explicitly, and in *Morgan*, 232 F.3d at 1015, recognized the conflict with both *Berry* and the Seventh Cir-

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date the victim appreciated the legal significance of her alleged injury because she perceived herself to be a victim of unlawful harassment in 1993 and did not file an EEOC charge until 1995.

cuit's *Galloway* decision. Likewise, since the decision below, the First Circuit has adhered to its own precedent with the observation, citing the decision below and *Morgan*, that "only the Ninth Circuit has taken a different position." *O'Rourke*, 235 F.3d at 731 n.6.[4] The "endless confusion" (2 B. LINDEMANN & P. GROSSMAN, *supra*, at 1351) that existed about the continuing violation doctrine even before the decision below has been greatly exacerbated, and it is time for this Court to step in.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Ninth Circuit's nebulous approach to the continuing violation doctrine effectively reads Title VII's limitations period out of the statute. There is no authority for this broad exception to Section 706(e) in the statute or in this Court's Title VII jurisprudence. Moreover, the rule adopted by the court below is so indeterminate as to be meaningless, promising, in the absence of intervention by this Court, to yield a body of case law that in essence amounts to no more than results in search of rationales. As Judge Kleinfeld aptly observed in his dissent below, "[t]his is result-oriented decision making at its worst." App., *infra*, 38a. The decision below is erroneous and should be reversed.

Title VII imposes strict procedural requirements on those who seek to invoke its remedies. Congress defined these procedural prerequisites "with precision," as part of a carefully reticulated enforcement scheme. *Alexander* v. *Gardner-Denver*

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[4] The Eighth Circuit is the one other circuit whose precedent might be perceived as resembling the Ninth Circuit's approach, but even that court's case law would likely have resulted in rejection of Fielder's claims. Compare *Gipson* v. *KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996) (describing workplace harassment as an "ongoing nightmare for the employee victim, in legal parlance, a 'continuing violation,'" and measuring the start of the limitations period from the last incident of harassment), with *Klein* v. *McGowan*, 198 F.3d 705, 710 (8th Cir. 1999) (holding that the continuing violation doctrine did not apply to plaintiff's harassment claim because "[t]he four incidents alleged during the 300 day limitation period do not amount to severe or pervasive harassment, nor are they tied to sex").

Co., 415 U.S. 36, 47 (1974). First, Section 706(e) requires employees who believe that they have suffered unlawful discrimination or harassment to submit a charge of discrimination to the EEOC within 180 days of the incident, or within 300 days if the employee first complains to a state or local agency with authority to investigate and prosecute unlawful employment actions. 42 U.S.C. § 2000e-5(e)(1). This requirement furthers the statute's remedial purpose by providing the EEOC with an opportunity to investigate the alleged violation and, if a violation is found, to engage the employer in informal discussions designed to secure its voluntary compliance with the requirements of Title VII. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975). Second, if the EEOC's efforts at conciliation fail and the agency elects not to bring an enforcement action on the employee's behalf, the employee must commence a civil action under Title VII within 90 days of receiving a "Right to Sue" notice from the EEOC. 42 U.S.C. § 2000e-5(f)(1). An employee's failure to file a timely EEOC charge, or to initiate a lawsuit within 90 days of receiving a Right to Sue notice, ordinarily will defeat the employee's Title VII lawsuit. See *Alexander*, 415 U.S. at 47.

Unambiguous provisions of a statute must be construed in accordance with their plain meaning. *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989). This is true of statutes of limitations no less than other types of enactments. See *Kubrick*, 444 U.S. at 117 (when Congress has established a definite limitations period, courts "are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims") (citation omitted); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978). The statutory provision at issue here, Section 706(e), requires that a charge of discrimination "***shall be filed***" with the EEOC within 180 days of the alleged violation of Title VII. 42 U.S.C. § 2000e-5(e)(1) (emphasis added). As this Court has recognized, the only textual exception to the 180-day requirement is that employees who first seek relief from a state or local employment agency are entitled to a "maximum additional 120 days" within which to file their

EEOC charge. *International Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). Congress "spoke[] with respect to what it considers acceptable delay when it established a [180]-day limitations period, and gave no indication that it considered a 'slight' [additional] delay * * * equally acceptable." *Ibid.*

The broad continuing violation exception adopted by the Ninth Circuit is inconsistent with the plain meaning and purpose of Section 706(e). The statute does not expressly provide an extended limitations period for continuing violations of Title VII. Even if some limited form of a continuing violation exception could be grafted onto the statute, the rule implemented by the court of appeals is so standardless that it itself knows no exception, thus rendering every alleged violation of Title VII a continuing violation that is exempt from the 180-day limitations period. Under the court's rule, as applied in this case, an employee need not file a charge of discrimination within 180 days of an act of harassment or discrimination, so long as he or she files within 180 days of some later act that, in the court's judgment, is "related closely enough" to the earlier (at that point untimely) incident. The "related closely enough" standard is a relaxed one, as the panel majority's holding in this case confirms. The practical effect of this rule is to extend the 180-day limitations period *indefinitely*, so that Title VII claims can never be extinguished if the putative victim continues to work for the same employer.[5] An employee who knowingly allows the statute to run on one Title VII claim, as respondent did here, can simply await the occurrence of some future event that has the

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[5] Indeed, even a post-employment adverse action, such as a bad reference, is actionable under Title VII, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). Therefore the Ninth Circuit's "related closely enough" rule, which was applied in this case to allow Fielder to revive untimely incidents of harassment based on later incidents that were not themselves harassment and that occurred while she was on leave, presumably would allow an employee to sue years after leaving employment on the ground that a bad reference was retaliatory and "related closely enough" to harassment that occurred during her employment.

"capacity of being considered retaliatory," App., *infra*, 22a, such as a supervisor's reprimand for arriving late to work, and then revive the stale claim by invoking the continuing violation doctrine. Surely Congress, in establishing a 180-day limitations period, could not have intended to permit such a boundless exception. See *Galloway*, 78 F.3d at 1166 (Section 706(e) is "shorter than the usual statute of limitations[,] and doctrines that would elongate the limitations period * * * are suspect").

Section 706(e), like any statute, must be construed so as to give effect to the "purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). One purpose of the statute is to encourage the prompt filing of discrimination charges. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Timely filing provides the EEOC with an opportunity to investigate and remediate alleged violations of Title VII at an early stage. Adherence to the limitations period also assures that the employer receives prompt notification of the alleged violation of Title VII so that it may voluntarily undertake corrective action. *Robbins & Myers*, 429 U.S. at 240 n.14. "Cooperation [with the EEOC] and voluntary compliance were selected as the preferred means" for eliminating discriminatory employment practices under Title VII. *Alexander*, 415 U.S. at 44. Another critical purpose of Section 706(e) is to provide repose by cutting off Title VII claims that are not the subject of a timely EEOC charge. See *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256-257 (1980) ("[W]hile guaranteeing the protection of the civil rights laws to those who promptly assert their rights, [Section 706(e)] also protect[s] employers from the burden of defending claims arising from employment decisions that are long past."); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977) ("United was entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a [timely] charge of discrimination."). Neither purpose is served by the Ninth Circuit's continuing violation rule, which allows employees knowingly to delay the filing of EEOC charges indefinitely, while maintaining their Title VII claims into perpetuity until it becomes convenient to sue on them. To the contrary, the lower

court's rule promises to "bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." *Rotella* v. *Wood*, 528 U.S. at 559.

Unlike the court below, this Court has never taken a begrudging approach to the construction of statutes of limitations. See *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879) (statutes of limitations "are found and approved in all systems of enlightened jurisprudence"). The Court has described the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938); accord *Ricks*, 449 U.S. at 259 ("It should not be forgotten that [Section 706(e)] [itself] promote[s] important interests."). Limitations provisions represent a legislative judgment that "it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R. R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Statutes of limitations afford plaintiffs what the legislature deems a reasonable time to present their claims, while protecting defendants and the courts from having to deal with cases in which "the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117.

This Court's decisions have instructed that statutes of limitations in general, and Section 706(e) in particular, are to be strictly enforced, subject only to certain narrow exceptions that apply when not inconsistent with the overall congressional purpose of the statute, including, in some cases, the doctrines of equitable tolling and equitable estoppel, and the discovery rule. See *Rotella*, 528 U.S. at 555; *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989); *Zipes*, 455 U.S. at 397-398. These exceptions excuse diligent plaintiffs from having to commence a lawsuit before it is reasonably feasible for them to do so. See *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1958); *Hanger* v. *Abbott*, 73 U.S. 532, 539 (1867) (commenting that

"exceptions [ ] are to be found in all such statutes [of limitations], but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence" on the part of plaintiffs).

This Court has consistently refused to recognize an equitable tolling rule, like the continuing violation rule of the court below, that would extend the limitations period for putative plaintiffs who knowingly fail to prosecute their claims in a timely fashion. "The equities do not weigh in favor of modifying the statutory requirements when the procedural default is caused by [the plaintiffs'] failure to take the minimal steps necessary to preserve their claims." *Hallstrom*, 493 U.S. at 27 (internal quotation marks omitted); accord *Rotella*, 528 U.S. at 559. Instead, the parties and the courts "ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett* v. *New York Cont. R.R. Co.*, 380 U.S. 424, 428 (1965); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983) (noting that the basic goal of limitations periods is to "prevent plaintiffs from sleeping on their rights"). The remedial purposes of Title VII do not justify a greater degree of solicitude toward victims of discrimination who fail to prosecute their claims in a timely fashion. To the contrary, as this Court observed in *Ricks*, Section 706(e) deliberately limits the "protection of the civil rights laws to those who promptly assert their rights." 449 U.S. at 256. When putative discrimination victims knowingly sleep on their rights, the Court has found "no policy reason that excuses [the employee's] failure to take the minimal steps necessary to preserve [her] claim." *Johnson*, 421 U.S. at 466.

This Court has considered and rejected in the Title VII context a variety of tolling rules that would extend the limitations period for plaintiffs who, like respondent here, knowingly failed to assert their rights in a timely manner for one reason or another. *Robbins & Myers*, for example, involved a plaintiff who believed she had been terminated from her job because of her race in violation of both Title VII and the collective bargain-

ing agreement between her union and the employer. See 429 U.S. at 231-232. The plaintiff submitted a grievance pursuant to the CBA, but did not file a charge of discrimination with the EEOC until after the limitations period had expired. *Id.* at 232. When the grievance committee rejected her grievance, the employee brought a lawsuit under Title VII and argued that the Title VII limitations period should be tolled during the pendency of the grievance proceedings, which, she alleged, occasioned only a "slight" delay and were sufficient to put the company on notice of her allegations of discrimination. *Id.* at 239-241. This Court found no policy reason why the employee's pursuit of her remedies under the CBA should suspend the limitations period for filing an EEOC charge. *Id.* at 239-240. Moreover, the Court observed that Section 706(e) was a carefully drawn provision that left the courts with no discretion to decide "which delays might or might not be 'slight.'" *Id.* at 240.[6]

The Court has also refused to enlarge the Title VII limitations period in favor of consciously indifferent plaintiffs who

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[6] The Court reached the same conclusion in *Johnson*, 421 U.S. 454. In that case, the plaintiff submitted a timely EEOC charge alleging race discrimination, and nearly two years later, he received a right-to-sue notice from the EEOC. See 421 U.S. at 455-456. Within the applicable Title VII limitations period, but outside the limitations period for actions under 42 U.S.C. § 1981, the plaintiff filed a lawsuit alleging race discrimination under both statutes. The district court dismissed the Section 1981 claim on limitations grounds, and dismissed the Title VII claim without prejudice when the plaintiff's lawyer withdrew from the case. See *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525, 526-527 (6th Cir. 1973). When the plaintiff attempted to refile the Title VII suit outside the limitations period, the district court dismissed that claim with prejudice also. *Id.* at 527. The plaintiff appealed the dismissal of his Section 1981 claim, arguing that the limitations period for that cause of action was equitably tolled during the pendency of the EEOC's investigation and attempts to negotiate a settlement. See 421 U.S. at 465. This Court upheld the dismissal on limitations grounds, observing that the plaintiff had been aware of his Section 1981 claim before the running of the limitations period, and that, "in a very real sense, [plaintiff] has slept on his § 1981 rights." *Id.* at 466. Again, the Court found "no policy reason that excuses [plaintiff's] failure to take the minimum steps necessary to preserve each claim." *Ibid.*

later allege the existence of a "continuing violation" of the statute. See *Evans*, 431 U.S. 553; *Ricks*, 449 U.S. 250. The plaintiff in *Evans* was discharged in 1968 pursuant to a policy that precluded female flight attendants, but not males, from marrying. 431 U.S. at 554. Although the policy was facially discriminatory, the plaintiff did not file a timely EEOC charge following her dismissal. *Id.* at 555. Several years later, after the no-marriage policy had been abolished, the plaintiff was rehired by the same employer. She did not receive seniority credit for her prior service because the company's policy was that seniority accrues only back to the most recent date of hire. *Ibid.* The plaintiff believed that this seniority rule, as applied to her, was unlawful because it deprived her of seniority credit that she would have received but for the earlier discriminatory policy, thereby giving present effect to prior discrimination. *Id.* at 557. In her view, the company was committing a "continuing violation." *Id.* at 558. The Court dismissed that contention, emphasizing that the "critical question is whether any present violation exists." *Ibid.* Because none existed in her case, the plaintiff was left with a discriminatory act that was "not made the basis for a timely charge [and which therefore was] the legal equivalent of a discriminatory act which occurred before the statute was passed." *Ibid.*

The Court's second encounter with the continuing violation doctrine in *Ricks* confirms that the "related closely enough" rule adopted by the court below is an impermissible construction of Section 706(e). In *Ricks*, the plaintiff was a university professor who received notice that the tenure committee had voted to deny him tenure. 449 U.S. at 252. The professor believed that this decision was unlawfully motivated by his national origin, but he did not file a timely charge with the EEOC. *Id.* at 253-254. Instead, he accepted a "terminal" one-year contract of employment with the university, delaying the filing of his EEOC charge until the end of the term. *Ibid.* According to the plaintiff, a variety of "unusual incidents" occurred during the final year, including one altercation in which the department chairman physically attacked him. *Id.* at 257 n.8. During the

ensuing Title VII litigation, the university moved to dismiss for lack of compliance with Section 706(e). *Id.* at 254. In response, the professor argued that the decision to deny him tenure was part of a continuing violation that culminated with his dismissal on the expiration of the one-year contract. *Id.* at 257. This Court found no continuing violation, holding instead that the plaintiff's Title VII claim accrued when he learned of the decision to deny him tenure, and that the failure to file a timely EEOC charge was fatal to his claim. *Id.* at 259, 261-262.

There is no doubt that *Ricks* would have come out the other way under the continuing violation rule adopted by the Ninth Circuit in this case. Under that rule, an employee's awareness that he or she has suffered a Title VII violation does not trigger the running of the limitations period; instead, it is irrelevant. See *Morgan*, 232 F.3d at 1915. Thus, the *Ricks* plaintiff would not have been prejudiced by his inaction after learning that he had been denied tenure because of his national origin. Instead, the critical inquiry in *Ricks* would have been whether the plaintiff experienced some event within the limitations period that was "related closely enough" to his denial of tenure. App., *infra*, 25a-26a. To carry his burden, all the *Ricks* plaintiff would have needed to do was allege some incident that "ha[d] the capacity of being considered [unlawful]." *Id.* at 22a. The *Ricks* plaintiff certainly discharged that burden; he alleged an assortment of "unusual incidents" within the limitations period, including one in which the department head physically attacked him. 449 U.S. at 257 n.8. Certainly, if respondent is entitled to survive dismissal by connecting sexual harassment allegations involving a coworker to retaliation claims against her supervisor, the *Ricks* plaintiff should have been permitted to link a discrimination claim against his employer to harassment allegations involving one of the same university officials who participated in the decision to deny him tenure. Neither the statute nor this Court's decisions in *Evans* and *Ricks* permit the bootstrapping of unrelated claims to defeat the Section 706(e). The decision below is erroneous and should be reversed.

III. THE SCOPE OF ANY "CONTINUING VIOLATION" EXCEPTION TO SECTION 706(E) IS AN IMPORTANT AND FREQUENTLY LITIGATED ISSUE

The resolution of the question presented by this case will have a profound impact on employment relationships covered by the federal antidiscrimination statutes. The lower court's rule, if left unchecked, will effectively repeal the statute of limitations for discrimination and harassment claims asserted under Title VII, Section 1981, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA").[7] Under this regime, discrimination victims and their coworkers will lose the benefits that accompany the prompt remediation of unlawful employment actions, and employers will forfeit the benefits of repose that otherwise would attend employment decisions that have gone unchallenged for years, and perhaps decades. Because most claims cannot lapse under the Ninth Circuit's rule, the federal courts will soon become immersed in the litigation of stale discrimination and harassment claims in which "the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117.

Title VII and the other federal antidiscrimination laws award compensation to victims of employment discrimination, but their primary purpose is to assure equality of employment by eliminating those practices and devices that discriminate on the basis of race, gender, age, disability, religion, and national origin. The "primary objective" of these statutes is "not to provide redress but to avoid harm." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998). Individual employees play a major role in the enforcement process of Title VII. *Alexander*,

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[7] The Ninth Circuit has not limited the application of its continuing violation rule to Title VII discrimination and harassment claims, and there is conceptual or procedural reason why the rule should apply only to claims arising under that statute.

415 U.S. at 45. By promptly filing a charge of discrimination with the EEOC, the putative victim gives the employer notice of the challenged policy or practice. *Robbins & Myers*, 429 U.S. at 240 n.14. In larger companies, and particularly with respect to harassment complaints, the corporate officials responsible for EEO compliance will likely have been previously unaware of the inappropriate conduct taking place in a remote division of the organization. The mere filing of the EEOC charge may thus trigger an internal investigation and other corrective action by the employer. See *Galloway*, 78 F.3d at 1167. In addition, the submission of a timely charge ensures that the EEOC will have an opportunity to investigate and redress discriminatory practices before they result in significant injuries to substantial numbers of employees. Prompt remediation is important because workplace discrimination and harassment adversely affect working conditions for all employees.

The continuing violation rule adopted by the court below, by extending the limitations period indefinitely for claims that are "related closely enough," removes the incentive for employees to act with dispatch after suffering what they believe was a discriminatory act. Unbeknownst to the company's senior management, an unlawful policy may remain in effect or a boorish supervisor may continue to sexually harass his subordinates over a period of years. During this period, as the employee's grievance continues to fester, her work performance may deteriorate while her injuries (and the company's potential liabilities) mount. The public benefit of eradicating unlawful employment practices, see *Alexander*, 415 U.S. at 45, also is postponed while the victim bides her time. See *Rotella*, 528 U.S. at 558 (observing that, in light of the public interests served by civil RICO claims, it would be "strange" to allow a tolling rule that delays the vindication of those public interests).

The Ninth Circuit's rule has profound implications for employers because it prevents the abatement of potential discrimination claims that the employee has allowed to languish for years. Ordinarily, companies arrange their affairs with the ex-

pectation that, after the passage of some reasonable period of time, past acts or omissions that go unchallenged may be treated as lawful. See *Evans*, 431 U.S. at 558. Based on that assumption, documents related to prior employment policies may be purged, and employees familiar with the events may have moved on to new jobs, making it more difficult to vindicate those policies years later in litigation.

In fiscal year 2000, the EEOC had a backlog of 34,297 discrimination charges that had not yet been investigated, down from 40,184 the year before.[8] New charges are being filed at a torrid pace; the EEOC received a total of 79,896 complaints in fiscal year 2000.[9] Harassment charges in particular are on the rise. Between 1980 and 1989, the EEOC received only 19,434 such complaints, but in the following decade this number more than quintupled to 109,472.[10] The pace can be expected to increase further once word gets out that employees in the nation's most populous circuit can obtain relief for incidents that occurred many years ago by pointing to a more recent job dissatisfaction that is "related closely enough."

Litigation over the application of the continuing violation doctrine in discrimination cases promises to tax the already overburdened resources of the federal courts, making it more difficult for other litigants, including discrimination victims with timely claims, to prosecute their cases expeditiously. The continuing violation theory has already proven to be a source of enormous confusion in the lower courts. See *Galloway*, 78 F.3d at 1167 (attempting to organize the "complex and diffuse case law on continuing violations under Title VII"); Paetzold & O'Leary-Kelly, *supra*, 31 AM. BUS. L.J. at 383 ("[A]lthough the doctrine has existed at least since the 1970's, it continues to be

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[8] See http://www.eeoc.gov/accomplishments-00.html.

[9] See http://www.eeoc.gov/stats/charges.html.

[10] See http://www.eeoc.gov/stats/harassment.html.

one of the most confusing and inconsistently applied developments in employment discrimination law."). With the enactment of the ADA, the ADEA, and the Civil Rights Act of 1991, discrimination cases have been pouring into federal courts in record numbers. See J.J. Donohue & P. Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-984 (1991) (observing that "the volume of federal employment discrimination litigation has grown spectacularly, many times faster than the overall federal civil caseload"); J.A. King et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 97-98 (1993) (noting that the number of federal discrimination suits has risen approximately 2,166 percent over the past two decades); S. Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1993) (noting that Title VII cases have been "flooding" the district courts and recommending that Congress establish a specialized Article I court to handle such cases). The Court should stem the erosion of Section 706(e) by reversing the decision below, which facilitates the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett*, 380 U.S. at 428 (internal quotation marks omitted).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2001

APPENDIX A

In the
United States Court of Appeals
for the Ninth Circuit

NO. 98-35511

JOANNE FIELDER,

Plaintiff-Appellant,

UAL CORPORATION, a Delaware corporation, dba UNITED AIRLINES,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon.
No. CV-95-03067-JPC - **John P. Cooney**, *Magistrate Judge.*

ARGUED SEPTEMBER 14, 1999–DECIDED JULY 10, 2000

Before ALDISERT,[1] KLEINFELD and W. FLETCHER, *Circuit Judges.*

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[1] Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

ALDISERT, *Circuit Judge*. This appeal by Joanne Fielder from summary judgment entered by the district court, a magistrate judge presiding, presents questions of hostile work environment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Issues raised by Appellant require us to decide (1) whether conduct by non-supervisory or non-managerial fellow workers may constitute actionable retaliation by the employer, a question of first impression in this court, (2) whether her claim is barred by the 300-day statute of limitations from the date the conduct occurred, 42 U.S.C. § 2000e-5(e)(1) ("[A] charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred ...."), or is still viable because of a continuing policy and practice of discrimination or retaliation and (3) whether she is estopped from asserting a claim of constructive discharge because her resignation was not timely.

Appellant Fielder filed claims of sex discrimination, retaliation and constructive discharge against her employer, UAL Corporation, dba United Airlines. The court determined that her claims were barred by the statute of limitations and that she was estopped from asserting her constructive discharge claim because she did not timely resign. We disagree. We hold that Appellant has presented sufficient facts that give rise to genuine issues of material fact relating to statutory limitations in presenting her discrimination claims and the timeliness of her resignation.

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The parties executed written consents for entry of final judgment by a magistrate judge. 28 U.S.C. § 636(c). This court has jurisdiction under 28 U.S.C. § 636(c)(3) (appeal from magistrate judge) and 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a), Federal Rules of Appellate Procedure.

Summary judgment is appropriate when the "admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure; *see Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989). We review motions for summary judgment de novo. *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1105 (9th Cir. 1998).

I.

We must set forth in some detail the historical and narrative background of an unfortunate, if not sordid, employment relationship between Ms. Fielder and United Airlines. She began working at United Airlines in Medford, Oregon on October 23, 1978 as a permanent, part-time customer service agent ("CSA"). Her general duties included flight preparation, handling baggage, taking reservations and seating passengers. She took a furlough from 1981 until June 1984. After returning, she continued to work for almost ten years, until April 20, 1994, when she was placed on medical leave at her request.

The record indicates that Fielder had been subject to sexual harassment for a long period of time during her employment. The series of incidents commenced when her co-worker, M.C.,[2] began to sexually harass her. She testified that he would frequently touch her shoulder, back, arms or hips while on the job. As early as 1991, she told him explicitly to stop touching her and that if he continued, she would obtain legal counsel and pursue a claim against him. *Id.* However, he continued this offensive conduct. In one incident, he pinned her to a departure board with his back and wiggled his rear end against her. In another incident, he picked her up and, ignoring her screams, twirled her around so hard she became ill. She has assigned no particular dates to these incidents.

On February 13, 1993, while she was checking in passengers, M.C. leaned over to her and asked her to go to bed with him. He

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[2] Because this matter will go to trial, we have decided not to refer to certain parties by their names.

did this in front of numerous customers during one of the busiest periods of pre-flight preparation. The public nature of this act prevented her from responding or reacting. She went home immediately after checking in her passengers. That night M.C. made the last of three obscene phone calls that he had made to her home during the period from mid-1992 to February 1993. During his third call, he repeatedly asked her if she was naked and he told her he wanted to "eat" her. Five days later, Fielder reported the sexual harassment to her supervisor, Ted Bibler. Her complaint alleged unwanted touching and harassing phone calls-allegations M.C. denied when Bibler confronted him with the complaint.

A few days later, M.C. confessed to the police that he had placed the obscene phone calls, and as a result entered into a criminal diversion agreement in July 1993. After she reported him, but before the July 1993 diversion agreement, Bibler did little to protect her from M.C. Furthermore, Bibler told her not to discuss the incident with her co-workers. Conversely, M.C. was allowed to discuss the incident, and he was able to convince their co-workers that he was in the right. About once every two weeks, Fielder asked Bibler to stop both M.C.'s continuing harassment and the retaliations she was receiving from her co-workers. She alleges that Bibler did very little to assist her and refused to prevent M.C. from working her shift.[3] She consulted an attorney who wrote two

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[3] Fielder explained the working environment and her response to it in her deposition:

> Ted [Bibler] would constantly say, Joanne, I can't make them like you. As if he could do nothing, would do nothing, to enforce what I considered the company's responsibility to provide a decent working environment, so I could check in those busy flights and do those gate operations.... From the time I came forward, until the diversion agreement, [M.C.] was trying to bid on my shift. And I was scared to death of [M.C.]. And each and every time, in order to keep from working on my shift, I had to go to [my attorney].... I had to get letters, which I could take back to United Airlines, which said: Don't put this guy on her shift until this matter has been settled.

letters on March 11, 1993 and April 7, 1993 to Bibler demanding that he not allow M.C. to bid onto Fielder's shift.[4]

> That is something I perceived as hostility and lack of support and protection from my company.... I, the person who came forward to report this crime, was put at odds with my co-workers.... Ted also informed me not to say anything about this situation to any of my coworkers.
>
> And I quote, he said it would polarize the office. Well, immediately started to retaliate against me, when I came forward that day to report him.... [He put] my ex-husband's return address in the front of his mailbox.... But went and told the other agents what had happened. And people seemed to be taking his side.
>
> Sides were taken at the very beginning, before any of the information, as I had been told, was even put out. Ted didn't want anyone to know about it. And then they were ganging up against me, as if I had been overreacting or something.... I was afraid, yet I was told to say nothing. Meanwhile the rumor mill grinds on, and Ted does nothing.

Plaintiff Depo. at 200-202.

[4] Her attorney's April 7, 1993 letter read:

> [M]y client is extremely concerned about this situation, given the fact that in your letter you indicated that [M.C.] may be reassigned to Ms. Fielder's shift in the very near future. As you are aware, a criminal charge has been filed against [M.C.], which directly relates to his dealings with Ms. Fielder. At this point, [M.C.] has a court appearance scheduled for May 3, 1993 on that criminal charge. That court appearance may or may not the end of the court proceedings.
>
> It is important for you, as Ms. Fielder's supervisor, and United Airlines, as her employer, to be aware that her emotional condition cannot, and will not, tolerate any contact with [M.C.] under these circumstances. The difficulty which has been created with regard to scheduling is the result of [M.C.'s] actions, not those of my client. A risk does occur that returning [M.C.] to Ms. Fielder's shift could lead to an occupational injury claim on her part as a result of the stress that this situation would place on her.

Included in M.C.'s diversion agreement was a no-contact-with-Ms. Fielder requirement, which mandated that he could not work the same shift as Fielder. However some contact was inevitable, especially during shift changes.

Bibler gave M.C. the strongest reprimand possible short of termination — a final written warning. However, Fielder testified that Bibler was unsupportive of her during the diversion agreement, and that M.C. was allowed to bid onto her shift on a number of occasions. It was only at her insistence that he was removed. Sometimes he was not removed until the night before the shift.

Other female employees complained to Bibler about M.C.'s behavior, including a complaint about an obscene phone call. Despite other complaints about M.C.'s conduct, Fielder contends that she was ostracized for reporting him to their supervisor. Joe Rossi, a co-worker, testified that other employees shunned her. While she was working, they would often refuse to answer technical questions she raised. As a result, she was less able to adequately perform her job. Fielder testified that various other incidents occurred, including an episode where she left her coat at the office and came back the next day to find it wadded up in the corner with muddy footprints on it.

Fielder states that S.R. was particularly retaliatory towards her. He was her coordinator and the employee who acted as manager in the manager's absence. He would punish fellow employees who displeased him by withholding required job assistance. For example, two workers, a CSA and the load planner, are required to unload baggage from a plane. It was S.R.'s job as the load planner to help unload the plane. If a co-worker displeased him, he would withhold this assistance.

Fielder alleged that S.R. sexually harassed her on a number of occasions, *see* Plaintiff Depo. at 82, 158-159, and that S.R. made

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Letter from Mueller to Bibler of 4/7/93, at 1.

comments towards Fielder and other women employees as having "great boobs," and "I wouldn't use anyone else's cock up her." Plaintiff Depo. at 158-159. After Fielder reported S.R.'s conduct, he would withhold his plane-loading assistance. *Id.* at 161. S.R. also withheld job assistance for her after she put M.C. on report. *Id.* at 193-194.

Fielder's attorney wrote two more letters, dated June 9, 1993 and September 3, 1993, which formally informed Bibler of the retaliatory working environment that had developed towards Fielder. The letters advised Bibler of the hostile treatment and attitudes of other employees towards Fielder.[5] He requested Bibler address the situation and stop the retaliatory conduct of the employees.

The record indicates that the retaliatory acts continued. Rossi testified that co-workers S.R., R.M., A.H. and L.P. became more hostile towards Fielder after she reported M.C.'s harassment. Rossi Depo. at 29. In August 1993, United representative Nellie

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[5] The pertinent portion of the April 11 letter reads:

> Under the United Airlines code of conduct, an employee is to be protected against retaliation for reporting a complaint of sexual harassment. Unfortunately, it appears that United Airlines is failing in this obligation to provide such protection to Ms. Fielder. On several occasions, she has reported to you conduct by other employees that does constitute direct or indirect retaliation against her. The attitude and behavior of Ms. Fielder's co-employees toward her has changed dramatically since the incident with Mr. [M.C.] has been reported.
>
> It is the obligation of the employer to maintain a workplace that is free of such retaliation and conduct by one employee toward another. On behalf of my client, I would respectfully request that you address this issue with the other employees in the workplace, and see to it that no further conduct of this type occurs in the future.

Letter from Mueller to Bibler of 3/11/93, at 1.

Yuret held a seminar on sexual harassment at the Medford station. Fielder described employee Bill Bruce as "exploding" at the seminar and accusing her of fabricating the harassment by M.C. Immediately after the seminar, she spoke with Bibler and Yuret and requested that they approve her pending transfer request application, in which she requested a move to Portland or Seattle. Assuming that her transfer application would be granted, she put a bid on a condominium in Portland shortly after the seminar. United challenges this finding, emphasizing there was testimony that Fielder did not want to leave Medford and that she thought the situation would just continue in any city where she transferred.

A co-worker and intermediate supervisor, R.M., screamed at Fielder in front of other employees telling her she had her "head up her ass." Rossi testified that R.M. did this because he blamed her for M.C.'s inability to be on the same shift as her. He said that on another occasion R.M. told her that she was "neurotic and sick." One day when she walked into the airport coffee shop, R.M. told her to "leave ... [y]ou are not welcome here." Fielder also testified that R.M. delayed a flight to protest M.C. not being able to work the same shift as Fielder.[6]

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[6] Fielder explained the working environment and R.M.'s reaction in her deposition:

> Q: Other than not being friendly and warm toward you, and not speaking to you, what other problems, if any, were there during this time period [while M.C. was in his criminal diversion agreement]?
>
> A: There was the daily problem of [S.R.] never backing me up on the ramp or the ticket counter. This created a constant environment of — it was hard to do your job when you knew you had to do more than what was your job. I was trying to work very, very fast to make up for the lack of support from my coworkers.
>
> Then there was the incident of [R.M.] delaying the airplane, because [M.C.] wasn't allowed to work an overtime shift. On that morning shift we were actually working one short. There

She testified that the environment was so hostile towards her that she would cry in the restroom almost daily. Cecilia Johnson, a co-worker, agreed that the working environment was stressful and that employees often retaliated against Fielder.[7] Others testified that the environment was generally hostile to women. Rossi claimed that on the ramp, where the work is very physical, some of the men would consistently give the harder work to women.

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might have only been four people on shift during that flight check in. And [R.M.] was furious because [M.C.] had signed up for the overtime and, because of the diversion agreement, [M.C.] was not allowed to work the shift. Consequently, there was more work to be spread out over those of us there, than if [M.C.] had been there.

Plaintiff Depo. at 193-194.

[7] Johnson testified about the work environment in her deposition.

Q: If you had to describe the working environment around the time you left, how would you describe it?

A: Stressful.

Q: Do you recall Joanne ever talking to you about the retaliation that she felt she was getting?

A: Yes.

Q: Did she discuss with you whether or not she had a talk with Ted Bibler about that?

A: Yes. I know that she did talk to Ted at several different times. I think Ted's attitude was sort of: What do you want me to do? That kind of attitude.

Q: Did that surprise you?

A: No.

E.R. at 28.

Fielder went to Bibler and asked him "[p]lease, when the diversion agreement is up, please keep him away from me. I'm very much afraid of him." E.R. at 15. When M.C.'s criminal diversion program was coming to an end, she tried to arrange a meeting with Bibler, M.C. and others to work out an agreement regarding M.C.'s conduct if he were allowed to work on her shift. Fielder testified that she

> wanted to iron out some safeguards for me, so that I could feel comfortable with M.C. on my shift. I had finally realized that there was nothing else I could do to keep him off of my shift. So I thought, perhaps, if we have some concrete rules and regulations on paper, that everyone agrees to and signs, that we could work together.

E.R. at 17. Bibler refused to hold the meeting. He told her that M.C. would have to commit some other improper act before United would take any further action to protect her. She made clear that she wanted United to guarantee that she would be physically separated from M.C., free of his harassment and that she would not have to work the gate with him. Bibler refused these demands. *Id.*

Fielder was warned by M.C.'s diversion officer that he is "one of the scariest of his types, because he's smart enough to walk with one foot on both sides of the line." Plaintiff Depo. at 252. Fielder testified that because of that statement and her past experiences, she was extremely worried that he might hurt her. As a result of Bibler's refusal to have the meeting or otherwise guarantee her safety, Fielder went on medical leave April 20, 1994. She told Johnson she was leaving and that "there was just too much that had gone on, and she would not work at the Medford station again." E.R. at 27. Because her request for transfer was still pending, it is unclear if Fielder meant she would never work for United again or not in United's Medford station.

Fielder made a successful claim for worker's compensation on August 18, 1994, and the date of injury was listed as April 20, 1994. Thereafter, she began attending rehabilitation therapy sessions approximately three times a week. On September 1, 1994, Fielder returned to the airport to escort her mother onto a United flight. After she boarded the aircraft, Rossi came onto the plane and, in front of the flight attendants, passengers and her mother, told her that Bibler wanted to see her in his office immediately and that there was "some trouble with [her] co-workers with [her] being on the airplane." E.R. at 21. When she reported to Bibler, he told her she was causing an upheaval at the airport and that she "showed poor judgment coming out to the airport at all." Fielder Depo. at 284. She claims the reprimand was public, because one could hear through his office doors and she saw two of her co-workers standing within a few feet of the door when she left.

Fielder testified that the reprimand left her with the impression that she should no longer go to the Medford airport for any reason. Fielder Depo. at 284. As a result, she did not return to Medford airport; whenever she had to fly, she went to Portland, Eugene or Redding. She testified that she did not want to go to the Medford airport because she believed Bibler's reprimand gave tacit approval to her co-workers to retaliate against her if she returned.[8]

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[8] Fielder explained in her deposition her version of what happened the day she was pulled off the flight:

> Q: Your complaint also alleges that you were disciplined for filing the criminal action against [M.C.] How were you disciplined?
>
> A: I was pulled off of an airplane. I was told that my presence at the airport was causing upheaval among my coworkers, and that I showed poor judgment in coming out to the airport at all. Even though I never once approached the ticket counter to encounter my fellow employees. I proceeded directly to the gate, cleared my access to the aircraft with the gate agent, and then once, again, while wearing my badge at all times, cleared with the A flight attendant on board.

Since I was told by Mr. Bibler that my presence at the airport was causing such an upheaval, I have not stepped one foot in the Medford Jackson County Airport. I travel now out of Eugene, out of Portland, and out of Redding, whenever I want to go any place. *I have been denied the right and privilege of flying out of Medford Airport by United Airlines.*

Q: When you say "denied," this is based on your conversation with Mr. Bibler resulting from the day when you were assisting your mother?

A: That is correct. And also the hostile environment that I know still exists at United Airlines against me, which I know that I would not be — I do not feel that I could check baggage or check into a flight and board an aircraft at this airport free from sabotage, interference, derogatory comments, or other harm.

Q: What other type of harm?

A: Being put in a seat which would be uncomfortable. Having someone seated next to me intentionally, who would be offensive. The guys used to do that, put people next to people who would bother other people, just to get even with them. Or delay a bag being checked, or check it someplace and hold it back. Or have some little mistake, which would inconvenience a flight and make it uncomfortable. I know how they feel about me. I'm not going to put myself in harms way or cause problems for myself or for them.

Q: And you feel that Mr. Bibler's comments to you that day were a disciplinary action?

A: Yes, I do. Ted set the tone of the office, which said Joanne was reprimanded for being out there, and I was not welcome at that airport

Q: [I ask you if there was anybody else in the office] because your complaint alleges that you were publicly reprimanded and harassed for assisting your disabled mother onto the airline.

A: Well, [S.R.] and [R.M.] and [A.H.] had gone to Ted [Bibler].

Bibler testified that he spoke with Fielder to explain the frustration other employees felt because she came to the airport while on medical leave to assist her mother onto a flight. He claimed that he did not know her mother was disabled or that she was helping her onto the aircraft. He simply thought she went with her mother to talk to her and see her off. However, he admitted there is no policy against an employee seeing off a relative.[9]

> They all saw me go in there to talk to Ted. The walls are thin. When I came out, [two co-workers], I believe were standing within two or three feet of the door. You can hear through the door.
>
> Q: So even though you were in an office with a closed door, you feel you were publicly reprimanded and harassed?
>
> A: Yes, because I was publicly pulled off of that airplane in front of other passengers, whom I knew. And in front of my mother, who was very upset by that incident. That was very embarrassing. And in front of the flight attendant that I had gained access from. Yes.

Fielder Depo. at 283-286 (emphasis added).

[9] Bibler also testified about the incident in his deposition:

> Q: And what if anything did you do at that point?
>
> A: Joe [Rossi] was working at the time, and I said — you know, because of Joanne — I said, I know it's very awkward, but if she has a moment or two, I'd really like to talk to her. And Joanne came into my office after her mother left, I believe. And I said, you know, I recognize your rights Joanne, but, you know, it is a very sensitive issue in the office, and just be aware. And she got very defensive, and the conversation basically ended. I think it was probably only a minute or two long and she left the office very upset.
>
> Q: What is the practice when an employee of United Airlines has a relative who may be disabled or may need assistance? What is the practice with that?

Rossi testified that employees have an informal practice of escorting their family members onto flights. He also admitted that he typically escorts his children onto aircrafts.

United did not act on Fielder's transfer request. Instead, in Fall 1994, United transferred another worker to Seattle, Johnson,

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A: I didn't know her mother was disabled. Is she? I don't know.

Q: Well, in general, say for example.

A: I don't know of any employee in the office — it is not a practice to go on the airplane and talk to relatives, that I'm aware of. To say it's never happened, I don't know.

Q: Is it a practice to assist relatives onto the plane, just assist?

A: Not that I'm aware of.

Q: And did Joanne ever admit to you that she had been just sitting there talking to her mother on the airplane? Did she tell you what she had been doing?

A: Yes. She was talking to her mother is what she said, seeing her mother off.

Q: Were your concerns more that other people were upset or that Joanne was violating some policy that you thought—

A: My concern was more with the sensitivity of trying to get this employee group to work together and try and understand one another, as opposed to a violation. *I'm sure other employees had probably done similar things, and so forth, but I was just concerned about the process.*

Q: Is there a policy against assisting?

A: A policy? No. I would say that there is — there is certainly not a policy to do it. To say that it's never been done or that it has been done, I can't say. But it's certainly not a policy to do it routinely.

Bibler Depo. at 39-42 (emphasis added).

who had less seniority than Fielder. Johnson testified that she was amazed how quickly her request was approved.[10] On May 10, 1995, Fielder's doctor released her to go back to work on the condition that she not work at United.

On May 9, 1995, Fielder filed an unlawful employment practices complaint against United with the Oregon State Bureau of Labor and Industries and on October 25, 1995, a complaint in the district court. The court granted United's motion for summary judgment and dismissed the case because the discrimination had

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[10] Johnson explained her transfer and Fielder's intention to move in her deposition:

> Q: At the time you moved up and transferred to Seattle, what was your seniority as compared to Joanne's?
>
> A: She had probably about four more years that I do. That's just a guess. But I know that she does have quite a few more years than I do.
>
> Q: Do you remember whether or not she discussed transfer before or after you put your transfer request in?
>
> A: It had to have been before, because when I put my transfer in, it was — to me, it was just amazing that it went through so quickly. And I wasn't actually even prepared for it, but I did it.
>
> Q: Did she ever discuss purchasing — "she" meaning Joanne — discuss purchasing a condo in Portland?
>
> A: Yes.
>
> Q: Do you remember when that was?
>
> A: No. I know that one time we went to Portland, and we drove by a place that she had looked at with her mother.

Johnson Depo. at 60-61.

not taken place within the 300-day limitations period and Fielder's resignation was not timely to qualify as constructive discharge.

II.

Before a suit may be filed under Title VII, 42 U.S.C. § 2000e, a plaintiff must either file a complaint with the Equal Employment Opportunity Commission within 180 days of the alleged violation or within 300-days if the plaintiff initially instituted proceedings with the appropriate state agency. 42 U.S.C. § 2000e-5(e)(1); see also *Mueller v. Los Angeles Fire Dep't.*, 637 F.2d 616, 617 (9th Cir. 1980).

Because Fielder filed an unlawful employment practice complaint with the Oregon State Bureau of Labor and Industries on May 9, 1995, it is the 300-day period that we must address. We recognize and emphasize that this limitations period covers those incidents that occurred between July 14, 1994 and May 9, 1995. Conduct that took place prior to the period is not actionable unless the continuing violation theory applies, *see Draper*, 147 F.3d at 1107, and it is this theory that commands our attention here.

> [A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point of time that falls within the applicable limitations period....

Green v. Los Angeles Cty. Superintendent of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989) (citing cases).

A plaintiff satisfies the continuing violation doctrine when he or she shows a "continuing policy and practice of discrimination on a company-wide basis" and that "[the] policy and practice operated at least in part within the limitation period." *Id.* It applies also

when a plaintiff alleges a "series of related acts, one or more of which falls within the limitations period" and when only a few discriminatory acts took place during the limitations period, but these acts were part of an ongoing unlawful employment practice. *Id.*

Fielder alleges that a company-wide policy and practice of discrimination resulted in a hostile work environment, contending that her manager, Bibler, contributed to the hostile work environment and that United failed to remedy the hostile work environment created by M.C. and her co-workers in violation of 42 U.S.C. § 2000e-2 (sex discrimination). The mere presence of her harassers in the workplace, she argues, maintained the hostile work environment during the limitations period and thus comes within the rubric of a continuing violation theory.

Fielder also alleges that she was subject to a series of related discriminatory and retaliatory acts, because her managers or supervisors retaliated against her and encouraged employee retaliation against her for reporting sexual harassment in violation of 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice...."). Fielder claims that she is permitted to sue for previous acts of discrimination, not just for those that fell within the limitations period, because the conduct prior to July 14, 1994 was sufficiently related to subsequent events.

To survive a motion for summary judgment for failure to satisfy the period of limitation requirement, a plaintiff must raise "a genuine issue of disputed fact as to the existence of a continuing violation," *Draper*, 147 F.3d at 1108, and must also "demonstrate that a genuine issue exists as to whether the violation continued into the relevant period of limitations." *Id.* Fielder is required to raise a sufficient question as to whether the sex discrimination and retaliation that occurred prior to July 14, 1994 continued into the 300-day period.

Because the legal elements of the various Title VII violations — hostile work environment and retaliation — are different, "[w]e consider the allegations with respect to each theory separately, in determining whether any of the events underlying these claims occurred within the relevant period of limitations." *Id.*

III.

We now must meet a threshold question of whether conduct by co-workers who are not supervisors may impose liability on the employer on a retaliation claim, a question that is open in this court. Clearly, employers may be held vicariously liable for hostile work environments created by supervisors. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.

Id. at 524 U.S. at 765. We must now decide if an actionable hostile work environment can be created by lower-level employees.

In *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998), the Court of Appeals for the Tenth Circuit concluded that employers may be liable for retaliation by co-workers, because adverse employment actions are not limited to ultimate employment decisions. The court explained that "co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim." *Id.* To decide whether we should adopt this approach, we may look for guidance in decisions from other courts. Adverse employment actions include "employer actions such as

demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees." *Wyatt v. Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (emphasis added); *see also Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("Nothing indicates why a different form of retaliation — namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII — does not fall within the statute.").

We are of the view that the interpretation of an adverse employment action as expressed by the Courts of Appeals of the First, Seventh and Tenth Circuits is consistent with the plain language of 42 U.S.C. § 2000e-3, which makes it "unlawful to discriminate against any . . . employees." As the *Wideman* court explains, "the term 'discriminate' is not limited to 'ultimate employment decisions.'" *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). If the statute were to be interpreted in a strict manner, employers could retaliate at will so long as the retaliation does not constitute an ultimate employment decision or rise to the level of a constructive discharge. *Id.* Because we have traditionally recognized the vital remedial role of Title VII, we hold, therefore, that Title VII's protection against retaliatory discrimination extends to employer liability for co-worker retaliation that rises to the level of an adverse employment action.

IV.

We now must decide the crucial question of whether Appellant met her burden of setting forth sufficient facts of a hostile work environment to constitute a genuine issue of material fact to preclude summary judgment against her. Her contention is anchored on the theory that the events that took place after the 300-day time period came within the rubric of the continuing violation theory.

A hostile work environment exists when a plaintiff shows; "(1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that this conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 875-876 (9th Cir. 1991). We examine elements of these claims from the perspective of a reasonable person of the victim's gender-here, from the perspective of the "reasonable woman." *Id.* at 883.

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Draper*, 147 F.3d at 1108. Most instances of hostile environments are not capable of facile identification. "[I]nstead, the day-to-day harassment [is] particularly significant, both as a legal and a practical matter, in its cumulative effect." *Id.* To satisfy the continuing violation theory, the plaintiff must show that a hostile environment exists and it continued into the period of limitations.

A.

We are satisfied that Fielder met the first prong of proving the continuing violation. She ably presented abundant evidence to show a hostile environment, contending that the conduct of her manager, Bibler, fostered an environment that "allowed fellow employees to harass, defame and discriminate" against her. Employers may be held vicariously liable for failing to remedy sexual harassment by employees when management knew or should have known of the harassing behavior. *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999). She alleges that management had actual knowledge of the harassment and retaliation by employees, such as M.C., R.M. and S.R., because she and her attorney brought it to her supervisors' attention a number of times.

Fielder testified that she was subjected to sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature and that M.C. began harassing her in 1991, three years before she went on disability leave. She testified that he touched her shoulder, back, arms or hips while she was on the job and described incidents when M.C. "wiggled" his rear end against her and twirled her around so hard she became sick to her stomach. He also committed phone harassment against her on three separate occasions, which included vulgar sexual propositions and sexually inappropriate comments.

The Supreme Court teaches that "[t]he correct inquiry is whether [appellant] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). When Fielder threatened to bring legal action against him, she made it clear to M.C. that his conduct was unwelcome. Moreover, the numerous complaints communicated to her supervisor and others made it clear to United that M.C.'s conduct was unwelcome. We now turn to the second, and more difficult, question: Did the hostile environment continue into the period of limitations?

B.

We have previously reserved the question of whether Title VII limitations period requires an overt "act" within the period or whether the mere presence of the harasser in the workplace is sufficient to give rise to employer liability. *Draper*, 147 F.3d at 1108 n.1. We have stated that "we reserve decision as to whether requiring such a showing is appropriate in the context of a hostile work environment claim, given that a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations." *Id.* We do not meet this question here, as urged by Appellant, because we are satisfied that at least two overt acts did take place and they relate to the question of discrimination as well as retaliation. We are persuaded that although we should

consider allegations of discrimination and retaliation separately, much of the evidence presented by Appellant is germane to both concepts.

We first look to see if the acts during the 300-day period of limitations involve the same type of discrimination as those committed before the period. We must inquire whether there is a common type of discrimination, such as sexual or gender-based harassment, or if there is a common kind of employment action, such as repeated denial of a promotion. *See Waltman v. International Paper Co.*, 875 F.2d 468, 475 (5th Cir. 1989); *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1561 n.5 (5th Cir. 1985). Every incident of discrimination before the limitations period need not be of the same type, so long as there is a corresponding type of discrimination within the period.

C.

The first episode within the relevant period is the reprimand Fielder received from Bibler for escorting her mother onto the plane. This incident may be considered an example of discrimination and has the capacity to reflect co-worker retaliation, employer retaliation and refusal to remedy a hostile working environment. Bibler called Fielder into his office in response to complaints by her co-workers. They may have complained because she was out sick or they may retaliated against her because she reported M.C.'s conduct. It is unlikely that they objected only to the act of escorting her mother onto the plane because, as the record indicates, United employees often escorted their family members onto their airline's flights. It is an issue of a material fact whether these employees sought to have Fielder disciplined for non-discriminatory reasons, *i.e.*, whether they were simply unhappy that she was on sick leave while escorting her mother or whether they were retaliating for her protected activity. So long as the conduct has the capacity of being considered retaliatory, it becomes an issue for the fact finder. Whether Bibler reprimanded Fielder in public in retaliation for making complaints against M.C.

or for other reasons is also appropriately a jury question. His admonition could be considered retaliatory because the language he chose, telling her she "showed poor judgment coming out to the airport at all," may have reasonably left Fielder with the impression that she should not go to the Medford airport again. Nevertheless, it could have been for a non-discriminatory reason. It is also a disputed issue of fact whether Bibler's reprimand encouraged retaliatory behavior against Fielder by her co-workers. Fielder had a fear of reprisals from other employees who might purposefully lose her luggage or engage in other retaliatory acts, because they had done these acts in the past and because Bibler's rebuke indicated that Fielder was not welcome at the airport.

If a jury finds that Bibler's reprimand was an act of retaliation, it becomes an issue of fact whether the retaliation was of the same kind alleged before the 300-day period. The retaliatory acts by management, before the period of limitations, were Bibler's refusal to prevent M.C. from bidding onto Fielder's shift before the diversion agreement, acting manager S.R.'s refusal to give her required job assistance and supervisor R.M.'s screaming at Fielder that she had her "head up her ass," telling her she was neurotic and sick and later telling her she was not welcome in the airport coffee shop. Fielder alleges that the motive behind these acts was retaliation against her for reporting M.C.

It is for the jury to decide also whether the motive for the employee retaliation was the same before and after July 14, 1994. Fielder alleges that employees would refuse to answer her technical questions, thus preventing her from adequately doing her job, that her coat was soiled by co-workers and employee Bruce publicly accused her of lying about M.C.'s harassment during a sexual harassment seminar. There is also testimony from Rossi that the attitudes of Fielder's co-workers became much more hostile towards her after she reported the harassment.

D.

We turn now to United's refusal to transfer Fielder. The refusal to transfer her may be evidence that United failed to take steps reasonably calculated to remedy a hostile work environment, *see Burrell*, 170 F.3d at 955, and this constitutes an overt act. Fielder expressed a willingness to move to a different city so that she could continue to work for United. She offered to remedy the problem by transferring, but United declined to take any action, thereby maintaining the status quo hostile environment. The brute fact is that a person with less seniority received the transfer. The transfer issue, too, presents a jury question on the issues of discrimination and retaliation.

V.

Generally, to determine whether the continuing violation doctrine applies, "[the] question . . . boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough [to the acts outside the limitations period]." *Green*, 883 F.2d at 1480-1481 (internal quotations and citations omitted). The Court of Appeals for the Fifth Circuit set forth a number of factors to assist in determining the presence vel non of a close relationship in *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983), but we are not convinced that this analysis is properly suited for a hostile work

environment.[11] Rather, we are satisfied with our previous teachings in this respect:

> A continuing violation may thus be established by not only demonstrating a company-wide policy of practice, but also by demonstrating a series of related acts against a single individual.... In the later instance, "[the] question . . . boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.'"

Green v. Los Angeles County Superintendent of Schools, 883 F.2d at 1480-1481 (citing *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961

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[11] *Berry* was an "equal pay" gender discrimination case and it set forth certain factors that may be considered whether discrete acts have the capacity to constitute a continuing violation in such a case. The court emphasized that "[t]his inquiry, of necessity, turns on the facts and context of each particular case" and stated:

> Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of this act is to be expected without being dependent on a continuing intent to discriminate?

Berry, 715 F.2d at 981.

Whatever the value of this analysis when comparing compensation according to gender, we are not persuaded that they are appropriately applicable in determining the continuation of a hostile environment.

(10th Cir. 1987)); *see also Draper*, 147 F.3d at 1109 (refusing to view "snide laughter and humiliating response" as an isolated event without reference to the circumstances in which it occurred in a hostile environment case).

We are satisfied that adopting the rationale in *Green* and *Draper* is sufficient enough for us to conclude here that the two overt acts occurring within the limitations period were so closely related to the acts of discrimination and retaliation previously experienced by Ms. Fielder as to trigger the operation of a continuing violation theory. We are satisfied that considering the totality of circumstances here, the episode relating to escorting her mother onto the plane together with subsequent events relating thereto, and the denial of her transfer request were closely related enough to constitute a continuing violation. Accordingly, we conclude that the district court erred in determining otherwise.

VI.

We turn now to the question of whether Fielder's charge of constructive discharge was properly dismissed by the district court as being untimely. The court based the dismissal of Fielder's constructive discharge claim on three alternative theories. It first determined that the claim was time-barred because the statute of limitations began to run when Fielder went on medical leave on April 20, 1994, rather than when she failed to return to work after the end of her medical leave on May 10, 1995. To the extent her claim was based on sexual discrimination, it determined that the constructive discharge claim was time-barred because the sexual discrimination by M.C. ended in February 1993. To the extent the claim was based on retaliation, it determined that the claim was barred because Fielder waited eight months after the alleged reprimand before quitting.

A.

Subsequent to the magistrate judge's decision in this case, this court held that the limitations period for a constructive discharge claim begins to run on the date of an employee's resignation. *Draper*, 147 F.3d at 1111. Fielder resigned on May 10, 1995. We have said that "[a] constructive discharge occurs when a person quits his [or her] job under circumstances in which a reasonable person would feel that the conditions of employment have become intolerable." *Id.* at 1110. Constructive discharge takes place when an individual "has simply had enough; [he] or she simply can't take it anymore." *Id.* Fielder has presented ample evidence from which a jury could find an intolerable working environment. Her evidence shows examples of retaliatory acts by her co-workers, such as withholding required help on the job, trampling on her coat with muddy feet and publicly accusing her of fabricating sexual harassment claims. She has also presented evidence of retaliatory acts by management, such as screaming at her in front of her co-workers, allowing co-workers to retaliate against her and allowing M.C. to bid onto her shift. Thus, Fielder has averred sufficient evidence for a jury to find a constructive discharge.

The key issue before this court is whether Fielder's resignation was timely for purposes of constructive discharge. The teaching in Draper instructs us that the date of the resignation triggers the limitations period in a constructive discharge case. *Id.* at 1110. We believe that events occurring within the limitations period prior to her resignation on May 10, 1995 — accompanying her mother onto the aircraft on September 1, 1994 and the transfer of co-worker Johnson in the fall of 1994 — are sufficient to conclude that her resignation was not untimely. We conclude, therefore, that the court erred in concluding that she was estopped from asserting this claim.

B.

A question arises as to whether Fielder's constructive discharge claim is barred because it was not part of her complaint, which pre-dated her date of resignation. She filed her Bureau of Labor and Industries complaint on May 9, 1995 and resigned on May 10, 1995. The general rule is that incidents of discrimination that are not included in an EEOC or state agency charge may not be considered by a federal court unless "the new claims are like or reasonably related to the allegations contained in the EEOC charge." *Green*, 883 F.2d at 1475-1476. To determine reasonable relation "the court inquires whether the original EEOC investigation would have encompassed the additional charges." *Id.* "Finally, the remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally." *Id.*

Fielder's constructive discharge claim is reasonably related to the discrimination and retaliation claims that were included in the complaint, because all three claims are based upon the same actions and conduct. Therefore, the administrative investigation should have included the constructive discharge and Fielder has not forfeited her right to pursue it in federal court.

* * * * * *

We have considered all contentions raised by the parties and conclude that no further discussion is necessary. We hold that Fielder's claims of sex discrimination and retaliation are not time-barred and she is not estopped from asserting her claim for constructive discharge. We conclude also that there is a genuine issue of material fact whether the events occurring within the 300-day period come under the ambit of the continuing violation period. The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

W. FLETCHER, *Circuit Judge*, concurring:

Judge Aldisert's opinion describes two "overt acts" during the limitations period, either of which is sufficient to render Fielder's filing timely. I write separately to give reasons, in addition to those adduced in Judge Aldisert's opinion, to support the conclusion that Fielder's complaint was timely filed.

I believe that nothing needs to be added to Judge Aldisert's accurate and detailed account of Fielder's attempt to accompany her mother onto the airplane at the Medford Airport, and of the subsequent reprimand by Bibler. I will say only that Fielder and United tell dramatically different versions of that episode. If Fielder's account is believed, as it must be on a motion for summary judgment, Bibler's actions constituted an overt act within the limitations period.

However, I believe it may be useful to add to Judge Aldisert's account of United's failure to grant Fielder's transfer request while granting a transfer request of an employee with less seniority. The dissent maintains that there is no evidence that Fielder's transfer request remained active during the 300-day limitations period, and that the majority is simply "making up facts." In her deposition, Fielder testified that sometime before August 1993 she had put in a request to transfer to Seattle or Portland, and there is no evidence in the record that she ever withdrew that request. I believe that our obligation to draw all reasonable inferences in favor to [sic] the nonmoving party compels us to conclude, for purposes of summary judgment, that the transfer request was still pending during the limitations period. *See Hunt v. Cromartie*, 526 U.S. 541, 552, (1999) ("[I]n ruling on a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.") (internal quotation and citation omitted).

The dissent further maintains that United's grant of a transfer request made by Cecilia Johnson, a co-worker with less seniority,

cannot support a claim of retaliation because Johnson, too, had complained about M.C. According to the dissent, Johnson's complaints about M.C., and her subsequent transfer, show that Fielder's claim of retaliation is groundless. I disagree, for there is evidence in the record showing that Fielder and Johnson were not similarly situated. According to Johnson's deposition testimony, she went to Bibler's office in the wake of Fielder's complaint to tell him "that this was not an isolated incident, that it should be taken very seriously, and that it should not be just brushed off." Johnson did so because she "wanted to make sure that Ted did not think that Joanne was just making it up." Johnson's deposition makes clear that her "complaints" were intended to support Fielder's case, not to press her own. When asked if she complained about M.C. before or after Fielder's incident with M.C., Johnson replied, "Why would I say anything before the incident?" Johnson continued: "My impression was that, after talking to Joanne, Ted wanted to put the whole thing to rest and just let everything that had gone on before — to just be done with it and start over again." Fielder, however, did not want to "be done with it." According to Johnson, Fielder "pushed" the issue. Based on this evidence, a reasonable jury could conclude that United transferred Johnson rather than Fielder because Fielder had complained vigorously and vociferously about sexual harassment while Johnson had not.

KLEINFELD, *Circuit Judge*, dissenting:

The majority opinion effectively eliminates the statute of limitations on sex discrimination cases. It does this in the face of a Supreme Court decision emphatically reinforcing the short statutory limitations period. Anger at how Fielder's fellow employees allegedly treated her and at her being criticized for helping her mother onto the airplane cannot justify disregarding the law. The practical consequence of the majority opinion is to keep alive incidents of claimed sexual harassment permanently, with no statute of limitations at all.

The statute of limitations is "within three hundred days after the alleged unlawful employment practice occurred."[1] Fielder filed on May 9, 1995. The date 300 days before Fielder's filing date is July 14, 1994. The statute thus requires us to see what sexual harassment (or employer discrimination for making a sexual harassment charge) occurred during that period. None did, because Fielder was not even there. Her last day of work was April 20, 1994, before the 300 day period even started. She did not work a single day during the 300 day period, so there was not even an opportunity for sexual harassment or employer retaliation to take place, let alone evidence that any did.

Judge Aldisert writes an emotionally stirring summary of Fielder's allegations about M.C.'s unwanted sexual invitations between mid-1992 and February 1993. Everything with M.C., all the unwelcome sexual conduct, stopped dead in February 1993. In February 1993, over two years before Fielder filed her charges in this case, Fielder complained to her supervisor, Mr. Bibler, and to the police, about M.C. Her supervisor, Mr. Bibler, immediately and firmly disciplined M.C. and changed M.C.'s assignment, so that he would not do anything like this again and would be separated from Fielder. Bibler counseled M.C. on appropriate behavior and placed him on "final notice." United Airlines' policy is verbal warning, then written warning, then final notice, then termination, but Bibler skipped over the first two steps of progressive discipline so that M.C. would be fired without further warning if he sexually harassed Fielder again. Fielder was asked in her deposition whether there was "anything that Mr. Bibler should have done at that meeting that he didn't do?" and answered "No." The district attorney's office did not prosecute M.C. criminally, as Fielder had sought, but they had him sign a "diversion agreement" in lieu of prosecution for "telephonic harassment," under which he had to avoid contact with Fielder for a year, pay a $100 fine, and continue mental health counseling. Fielder admits that M.C. never again made an unwelcome sexual

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[1] 42 U.S.C. § 2000e-5(e)(1).

overture or remark to her after Bibler's discipline of M.C. She has many criticisms of M.C.'s and United's subsequent conduct, *e.g.*, she once saw M.C. in the airport returning a rental car when she was there, and he once "growled" as though angry when he saw her, and sometimes she called management to take him off her shift when they both bid for the same shift (they always removed him at her request). But she has absolutely no allegations that M.C. ever again made any sexual remarks or overtures to her after she complained about them in February 1993.

The 300-day statute of limitations has been interpreted by the Supreme Court quite strictly. In *Delaware State College v. Ricks*,[2] the Supreme Court held that the time ran from when the discriminatory act occurred, denial of tenure, not from the later date when the complainant's job ended. The Court held that this is what the statute means when it says within the time period "after the alleged unlawful employment practice occurred." "It is simply insufficient for Ricks to allege that his termination 'gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination.' The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present violation exists.'"[3] "It should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'"[4] Ricks expressly rejected the proposition that the unlawful employment practice was a "continuing violation" so that the limitations period would not start until the job ended.[5]

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2 *Delaware State College v. Ricks*, 449 U.S. 250 (1981).

3 *Id.* at 258.

4 *Id.* at 259-60.

5 *Id.* at 257.

Today's majority strains to find something within the 300 days preceding filing, and comes up with two events: (1) not granting her a transfer; and (2) telling Fielder that it was not a good idea to board the plane with her mother. Fielder lost her case on summary judgment, not on a 12(b)(6) motion, so it is not enough that some good claim can be imagined on the basis of her complaint. She needs sufficient evidence so that a reasonable jury could find that these occurrences were sex discrimination or company retaliation for bringing a sexual harassment claim earlier.[6] She lacks it.

Fielder has absolutely no evidence that United's failure to grant her request for a transfer (the majority refers to "United's refusal to transfer Fielder" but the record shows no refusal during the 300 days) was sex discrimination or retaliation for filing a sex discrimination complaint. Fielder was not at work at all, not for a single day, during the three hundred day period. United transferred another woman during the 300 days who had also complained about sexual harassment by M.C., so even if there had been a refusal to transfer, Fielder would lack evidence that the refusal to transfer her was retaliation for complaining about M.C. The majority refers to the "brute fact that a person with less seniority received the transfer," as though that meant something. It does not. What means something is that the transfer went to a woman who was going to work every day, not one who was gone with no assurance of return, and who had also made a sexual harassment complaint about M.C. Fielder submitted no evidence whatsoever to support her accusation that United's failure to transfer her was somehow a discriminatory or retaliatory act.[7]

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[6] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1228 (9th Cir. 2000) (quoting *Anderson*).

[7] Judge Fletcher argues that the transfer of Fielder's friend, Johnson, over Fielder supports a claim for retaliation because "Johnson's . . . 'complaints' [of harassment] were intended to support Fielder's case, not to press her own." The record does not support this claimed distinction, even if it would make a difference, which is doubtful. Here is Johnson's deposition

testimony:

> Q Did [M.C.] ever touch you in a way that made you feel uncomfortable?
>
> A Yes.
>
> Q Would you describe that please?
>
> A There were several occasions when I would be sitting at the desk, and he would come up behind me to rub my neck, and then move his hands down the front of my chest.
>
> * * * * *
>
> Q Did you describe this to Ted Bibler?
>
> A Yes, I think I did.
>
> Q Do you remember when you told Ted Bibler about this?
>
> A No, I don't have a date. I know it was after this had gone pretty far, and it actually looked like nothing was being done. It seemed like everything was being swept under the rug. And I wanted to make sure that Ted did not think that Joanne [Fielder] was just making it up.

This testimony establishes that Johnson complained to get something "done" about M.C.'s harassment of the two of them, and complained specifically about M.C.'s improper conduct toward herself. Bibler's response to Johnson's complaint shows that United regarded her complaints as personal in nature. Johnson testified that "His [Bibler's] reaction was: Has he done anything *to you* recently? And I said, not recently. And he said, I want to know if he does anything *to you* ever again."

Judge Fletcher also argues that Johnson, unlike Fielder, did not "push [ ] the issue," so that "a reasonable jury could conclude that United transferred Johnson rather than Fielder because Fielder had complained vigorously and vociferously about sexual harassment while Johnson had not." But Johnson says she complained about M.C. because "it actually looked like nothing was being done" and "[i]t seemed like everything wasbeing swept under the rug." That is "pushing the issue." She complained about M.C.'s misconduct directed at herself, and the misconduct toward her stopped. In

Nor did Fielder submit any evidence that United knew during the three hundred day period that she even wanted to be transferred. She testified in her deposition that about a year before the three hundred day period began, she had complained about the situation to a sexual harassment trainer who was visiting, and that "at that point, I had transfer requests in" which "were active." She submitted no evidence whatsoever that she had any transfer request pending during the three hundred days. Indeed, her friend, the one who also complained of sexual harassment by M.C. and who got the transfer, testified at her deposition that Fielder's talk about a transfer was "short-lived," "she did not want to leave Medford," and she said that "[t]hey are not going to force me out of my home." Thus there is no evidence that Fielder wanted a transfer during the 300 days, and uncontradicted, plausible evidence that she did not want a transfer.[8] The majority is simply making up

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this regard, she was similarly situated to Fielder, who also did not experience any further harassment from M.C. after she complained and he was disciplined. Nor was this Johnson's first complaint about her male co-workers. She, like Fielder, had complained previously to Bibler about male co-workers "sabatoging" female coworkers by forcing them to lift heavy bags off the belt. Johnson, like Fielder, made multiple complaints about the behavior of her male co-workers toward her. Thus, Johnson's success in getting the transfer is highly probative of the absence of any retaliatory reason for not transferring Fielder, and there is no evidence to the contrary.

United had a legitimate business reason for transferring Johnson, but not Fielder. Johnson got the transfer because she was working every day during the relevant time period. Fielder was on sick leave with no guarantee of ever returning, and it was not clear that Fielder's old transfer request was still pending. Fielder bears the burden of presenting specific and substantial evidence that this reason was pretextual, and has no such evidence.

[8] Judge Fletcher's concurring opinion argues that we must treat the transfer requests as being active during the limitations period because of our obligation to draw all reasonable inferences in favor of the nonmoving party. But such an inference is not reasonable in light of Johnson's uncontradicted testimony that Fielder's interest in the transfer was "short-lived." Our duty to draw all reasonable inferences in favor of the nonmoving party does not

facts, simply making them up, to concoct a reason to get around the statute of limitations, when it says that "United's refusal to transfer Fielder" during the 300 days was one of "two overt acts" within the 300 days that would "trigger the operation of a continuing violation theory." It is ridiculous to treat an employer as retaliating by refusing a transfer when the employee did not want the transfer and was no longer working, and the employee who got the transfer did exactly the same thing that the "refusal" was supposed to be "retaliation" for. This is result-oriented decision making at its worst. It is also a frightening harbinger for employers making hiring decisions.

The other supposed "overt act" is what the majority characterizes as "discipline" when Mr. Bibler "reprimanded Fielder in public in retaliation for making complaints against M.C." Again, the majority opinion needs correction from the record. The record shows that it was not "public," not a "reprimand," and not employer "retaliation." Fielder has no evidence from which a jury could decide that Fielder's employer publicly reprimanded her in retaliation for her sexual harassment complaint against M.C.

Though the majority suggests that Fielder's supervisor dressed her down in public, both Fielder and the supervisor testified that he spoke to her alone in his office with the door shut. Where a supervisor talks to an employee in his office with the door shut, it is not "public." It is as private as he can make it. Fielder says in her deposition that she thought it was possible that someone could overhear him if they were right outside his closed door, and that two employees were near his closed door, but she does not even

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permit us to draw an inference in the face of undisputed evidence to the contrary. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (noting that inference drawn must be reasonable in light of competing inferences); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999); *Sylvia Development Corp. v. Calvert Cty.*, 48 F.3d 810, 818 (4th Cir. 1995). Once Fielder developed the feeling that "they are not going to force me out of my home" by transferring her, the only reasonable inference is that her transfer request was dead.

allege that he raised his voice. This evidence does not establish a genuine issue of fact as to whether Mr. Bibler spoke to her publicly; it establishes without contradiction that he spoke to her privately.

Nor is there any evidence whatsoever that this conversation was, as the majority characterizes it, a "reprimand" by which Fielder was "disciplined." Two people were there, Bibler and Fielder. Here is what Mr. Bibler, the supervisor, testified to about what he said:

> Q Some time around September of '94, do you recall a situation where you had requested that Joanne come off of a plane and talk with you in your office?
>
> A Yes, I do recall that.
>
> Q Could you tell me how you came to know that she was even on the premises?
>
> A Either two or three employees came into my office saying that Joanne [Fielder] was — I don't recall the specific dates — but Joanne [Fielder] was seeing her mother off on a trip. I wanted her to realize how frustrating it is for them. Number one, they routinely do not go on airplanes. And number two, she hadn't been to work for a number of weeks. They were just frustrated by that process.
>
> Q Was one of those individuals Stan Reynolds?
>
> A No.
>
> Q Do you recall who they were?

A Liz, I believe was one. And I believe the other one was Anita Hatton. And if there is a third one, I can't recall. Those are the two that I remember.

Q Did they come together or separately?

A I think they were together. There were two or three employees in my office at once. It was just a passing comment.

Q And what if anything did you do at that point?

A Joe [Rossi] was working at the time, and I said--you know, because of Joanne [Fielder] — I said, I know it's very awkward, but if she has a moment or two, I'd really like to talk to her. And Joanne [Fielder] came to my office after her mother left, I believe. And I said, you know, I recognize your rights Joanne [Fielder], but, you know, it is a very sensitive issue in the office, and just be aware. And she got very defensive, and the conversation basically ended. I think it was probably only a minute or two long and she left the office very upset.

Q What is the practice when an employee of United Airlines has a relative who may be disabled or may need assistance? What is the practice with that?

A I didn't know her mother was disabled. Is she? I don't know.

Q Well, in general, say, for example.

A I don't know of any employee in the office — it is not a practice to go on the airplane and talk to relatives, that I'm aware of. To say it's never happened, I don't know.

Q Is it a practice to assist relatives onto the plane, just assist?

A Not that I'm aware of.

Q And did Joanne [Fielder] ever admit to you that she had been just sitting there talking to her mother on the airplane? Did she tell you what she had been doing?

A Yes. She was talking to her mother is what she said, seeing her mother off.

Q Were your concerns more that other people were upset or that Joanne [Fielder] was violating some policy that you thought—

A My concern was more with the sensitivity of trying to get this employee group to work together and try and understand one another, as opposed to a violation. I'm sure other employees had probably done similar things, and so forth, but I was just concerned about the process.

Q Is there a policy against assisting?

A A policy? No. I would say that there is — there is certainly not a policy to do it. To say that it's never been done or that it has been done, I can't say. But it's certainly not a policy to do it routinely.

Bibler further described the occurrence in his affidavit:

I did have a conversation with Joanne Fielder in my office, with the door closed, regarding her being at the airport to assist her mother on a flight while being off work on medical leave. While Joanne was on medical

> leave, she was allowed to bid her shift. Inasmuch as she was not at work, that shift was one employee short. Her presence at the airport caused concern to other employees in that she was able to come to the airport to assist her mother onto a flight, however, claimed not to be able to work. I discussed the need for sensitivity in regard to co-workers feelings in this matter with Joanne. She was not reprimanded for assisting her mother onto a flight.

This evidence establishes that Mr. Bibler acknowledged that Ms. Fielder was within her "rights" ("I recognize your rights"), but asked her to "be aware" that her going onto the plane was "a very sensitive issue in the office." Far from reprimanding her, he asked her to respect "the need for sensitivity in regard to co-workers feelings," because they were working one person short on her shift while she was staying out on medical leave. She did not agree on "the need for sensitivity in regard to co-workers feelings," which he conceded was within her "rights."

Fielder's testimony does not establish a genuine issue of fact as to whether she received a disciplinary reprimand in this conversation. Here is her deposition testimony:

> Q Your complaint also alleges that you were disciplined for filing the criminal action against [M.C.]. How were you disciplined?
>
> A I was pulled off of an airplane. I was told that my presence at the airport was causing upheaval among my coworkers, and that I showed poor judgment in coming out to the airport at all. Even though I never once approached the ticket counter to encounter my fellow employees. I proceeded directly to the gate, cleared my access to the aircraft with the gate agent, and then once, again, while wearing my badge at all times, cleared with the A flight attendant on board.

Since I was told by Mr. Bibler that my presence at the airport was causing such an upheaval, I have not stepped one foot in the Medford Jackson County Airport. I travel now out of Eugene, out of Portland, and out of Redding, whenever I want to go anyplace. I have been denied the right and privilege of flying out of Medford Airport by United Airlines.

Q When you say "denied," this is based on your conversation with Mr. Bibler resulting from the day when you were assisting your mother?

A That is correct. And also the hostile environment that I know still exists at United Airlines against me, which I know that I would not be — I do not feel that I could check baggage or check into a flight and board an aircraft free from sabotage, interference, derogatory comments, or other harm.

* * * * *

Q All right. The comments Mr. Bibler made to you on that day, where were you at the time he spoke with you?

A In his office.

Q Was there anybody else in the office?

A No.

Q Was the door open or closed?

A Closed, I believe. I'm sure it was.

Q Because your complaint alleges that you were publicly reprimanded and harassed for assisting your disabled mother onto the airline.

A Well, Stan and Ron and Anita Hatton had gone to Ted. They all saw me go in there to talk to Ted. The walls are thin. When I came out, Ron and Dave, I believe were standing within two or three feet of the door. You can hear through the door.

Q So even though you were in an office with a closed door, you feel you were publicly reprimanded and harassed?

A Yes, because I was publicly pulled off of that airplane in front of other passengers, whom I knew. And in front of my mother, who was very upset by that incident. That was very embarrassing. And in front of the flight attendant that I had gained access from. Yes.

Q And Mr. Rossi is the one who came and spoke to you?

A He came and told me that Ted wanted to see me in his office. That I was to leave the airplane. That I was causing — that there was some trouble with my coworkers with me being on the airplane.

Q Mr. Rossi made all of those statements while he was on the airplane?

A That's correct. In front of my mother and the other passengers.

The Mr. Rossi that Fielder refers to is not the supervisor who allegedly reprimanded her; he was her former coworker whom she

was dating and living with at the time of the incident. Bibler is the supervisor whom she claims reprimanded her in public.

The difference between Fielder's account and Bibler's is tone, not substance. Her own testimony about what Bibler said (as opposed to what she felt) was that he said her presence "was causing upheaval" and "showed poor judgment." There is no genuine issue of fact. She does not deny that he acknowledged her "rights" to do just what she did. Nor does she testify that he characterized what he said as a disciplinary reprimand. All she claims he did was tell her that the other workers were unhappy about her showing up, while they were a hand short and she was on sick leave, to escort her mother onto a plane. This evidence does not establish a genuine issue of material fact as to whether Fielder suffered an adverse employment action, consisting of a public disciplinary reprimand, within the 300 days.[9] Yet that is required

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[9] *See Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (holding that a supervisor's "scolding . . . and threatening to transfer or to dismiss" are not adverse employment actions and explaining that "[m]ere threats and harsh words are insufficient"). *See also Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999) (holding that a supervisor's criticism and threat that the complainant would be "fired for any subsequent exercise of poor judgment" was not enough for an adverse employment action (emphasis added)); *Sanchez v. Denver Public Schools*, 164 F.3d 527, 533 (10th Cir. 1998) (holding that a supervisor's oral threats and "ageist" remarks "did not rise to the level of a materially adverse employment action"); *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) (holding that an employee had not suffered an adverse employment action when "she was unfairly reprimanded for conduct she either did not engage in or should not have been responsible for"); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3rd Cir. 1997) (holding that "'unsubstantiated oral reprimands' and 'unnecessary derogatory comments'" following a sexual harassment complaint did not "rise to the level of the 'adverse employment action' required for a retaliation claim"); *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997) (holding that "an employer's criticism of an employee, without more," is not an adverse employment action).

to make out a prima facie case of retaliation under the statute.[10] The record establishes the absence of a genuine issue of fact, and consistent evidence that she was spoken to privately about offending other worker's feelings, while acknowledging her rights.[11]

Finally, the majority can point to no evidence at all that this private discussion about sensitivity to others' feelings was retaliation by the company for Fielder's sexual harassment complaint. Instead, the majority rests on sheer implausible speculation: "It is unlikely that they objected only to the act of escorting her mother" so "[i]t is an issue of material fact whether" the employees who complained "were retaliating for her protected activity."

Actually, there is no evidence whatsoever that the employees who went to Bibler's office to complain, "Liz," "Anita Hatton," and possibly a third, were trying to cause trouble for Fielder because she had accused M.C. of sexual harassment, nor would it matter if they were. The record is uncontradicted that the other workers were upset because Fielder was out on what was supposed to be some sort of medical leave, her shift was a person short because she was holding onto her slot despite being out on medical leave, and the employees resented her showing up and taking advantage of an employee's privilege when she was not showing up to help them do the work. There is nothing at all "unlikely" about that. People who work hard commonly resent it if they feel that a fellow employee is not pulling her share of the load.

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[10] *See, e.g., Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

[11] I must disagree with Judge Fletcher's observation that "Fielder and United tell dramatically different versions of that episode." The difference is in what Fielder claims to have felt, not in what was said.

Fielder did not put any deposition testimony in the record from the people who went to Bibler about why they went to Bibler; thus, she established no genuine issue of fact as to anyone's retaliatory motivation. Bibler said in his affidavit that even though Fielder was on medical leave, she was allowed to hold onto her shift, so "that shift was one employee short." He said in his affidavit that the other employees' concern was "that she was able to come to the airport to assist her mother onto a flight," while at the same time she "claimed not to be able to work." Thus, there is not even a genuine issue of fact about whether the other employees' complaints to Fielder's supervisor were an attempt to retaliate for her sexual harassment complaint.

Our cases make it clear that what Fielder offers is not enough to raise a material issue of fact. When an employer has offered legitimate business reasons for its actions, to avoid summary judgment, the nonmoving party must present evidence of pretext that is " 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex."[12] Our case law shows that "substantial" means quite a bit. In *Nesbit v. Pepsico*, Inc.,[13] we held that the plaintiff had not presented sufficient evidence to avoid summary judgment on his age discrimination claim even though a supervisor had commented that "we don't necessarily like grey hair" and the company president had said that "we don't want unpromotable fifty-year olds around."[14] Likewise, in *Nidds v. Schindler Elevator Corp.*[15] we held that the plaintiff had failed to present sufficient evidence to avoid summary judgment on a retaliation claim despite a showing that the District Supervisor had said he "intended to get

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12 *Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir. 1998).

13 *Nesbit v. Pepsico, Inc.*, 994 F.2d 703 (9th Cir. 1993).

14 *Id.* at 705.

15 *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996).

rid of all the 'old timers' because they would not 'kiss my ass.'"[16] If the plaintiffs in *Nidds* and *Nesbit*, with significant evidence of discriminatory intent, cannot survive summary judgment, then it follows a fortiori that Fielder, who offers far less, cannot either.

So where does the majority get its genuine issue of fact? From imagined facts combined with two errors of law, with likely pernicious consequences for the law and for employers and workers. The majority supposes that (1) some coworkers thought Fielder was cruel and unfair in what she did to M.C.; (2) some coworkers expressed their feelings in spiteful interactions (all long before the 300 day period) with Fielder after she caused management to give M.C. a (genuine) disciplinary reprimand, a "final warning," and removed him from Fielder's shift; (3) a jury could conclude that the employees who went to Bibler when Fielder boarded the plane with her mother, "Liz" and "Anita Hatton," did so to retaliate for Fielder's having made a sexual harassment complaint; (4) a jury could conclude that Bibler's supposed public reprimand was retaliation for making a sexual harassment complaint.

The retaliation statute says that it is an unlawful employment practice for "an employer" to discriminate against an employee because the employee has made a discrimination charge. There is absolutely no evidence, none whatsoever, that Bibler's motivation in talking to Fielder about her showing up to put her mother on the plane was to discriminate against Fielder for filing sexual harassment charges against M.C. He had taken unsparing action against M.C. at the time, and it worked. Another employee who also made a sexual harassment complaint against M.C. obtained the transfer that Fielder now claims she should have received. The uncontradicted evidence is that Bibler spoke to Fielder because the two women who came into his office were upset that they were a person short because of Fielder's claimed disability, for which she was getting sick leave and workers' compensation, yet she was

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[16] *Id.* at 915, 920.

well enough to come to the airport and put someone on the plane. Fielder presented no evidence that Bibler, her supervisor, ever did any of the nasty things she accuses her coworkers of.

So, in the absence of any evidence that Bibler was retaliating against Fielder for her having charged M.C. with sexual harassment, how does the majority convert their conversation into a discriminatory labor practice? It creates a new rule, "[s]o long as the conduct has the capacity of being considered retaliatory, it becomes an issue for the fact finder."[17] That conflicts with the controlling rule in cases like this one that requires "specific" and "substantial" evidence.[18] If the majority's rule were the rule, *Nidds* and *Nesbit* would have gone the other way. The majority compounds this legal error with the theory that maybe Fielder's coworkers would not have spoken to Bibler but for their remaining hostility to her. It is the coworkers whom the majority thinks a jury could find were retaliating.

The law does not provide for a remedy against the company for coworkers' negative sentiments. It does where the coworkers retaliate, management knows about it, and management does nothing. Had Fielder claimed and produced evidence to show that, within the 300 day period, coworkers had done such things as not providing ordinary mutual assistance with heavy loads, that she complained to management, and that management had allowed the retaliation to go on, then she would have a case that could go to a jury. That is what a coworker retaliation claim is about. But Fielder presents no such claim or evidence.

Fielder's claim, which the majority seems to accept, is that there was a "continuing violation" under *Draper v. Coeur*

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[17] A Slip Opinion at 986.

[18] *See, e.g., Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir. 1998); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994).

Rochester Inc.[19] because it was a fair inference that some coworkers still did not like her and M.C. had not been fired. Perhaps they did not, but that is not enough. The "continuing violation" doctrine is sharply limited by Ricks. There the Supreme Court held that there was no continuing violation, even though the complainant was still on the job within the limitations period, and even though his employer could have changed its position and kept him instead of terminating him at the end of his terminal contract. Fielder's argument, that the discrimination continues even when she is not there because the "passive hostile conditions created by [M.C.'s] looming and unrestricted presence . . . continued,"[20] cannot be reconciled with Ricks. The majority relies on *Draper*, but it has no bearing on this case. In *Draper*, we held that the plaintiff could sue for a continuing violation because she had presented sufficient evidence that the harassing conduct continued until the date of discharge, which fell within the limitations period.[21] Here the harassment did not continue into the limitation period; it stopped long before the 300 day limitations period started, and Fielder did not work at any point during the limitations period.

The majority also relies on *Draper* to find a constructive discharge. Again, it has no bearing on this case. In *Draper*, the plaintiff complained twice to management about her supervisor's sexual harassment, but it did not stop, so she felt forced to quit; we held that she could sue for constructive discharge where the constructive discharge occurred in the 300 day limitations period. Fielder established no genuine issue of fact on her constructive discharge complaint, because M.C.'s harassment that she said made her job intolerable had stopped long before the 300 day period. So had the coworkers' alleged retaliatory acts that she claimed made the workplace intolerable, because she did not work there at all

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19 *Draper v. Coeur Rochester Inc.*, 147 F.3d 1104 (9th Cir. 1998).

20 A Plaintiff's Brief at 23.

21 *Draper*, 147 F.3d at 1109.

during the 300 day period. She did not resign while working with the allegedly retaliating coworkers. She resigned when her workers' compensation disability pay and her medical pay ran out, and continued to hold her slot on her shift until then. Yet nothing during that period could establish the requirements for constructive discharge, because she was not at work or subject to any working conditions that were so intolerable that she was forced to quit.

Our decisions on constructive discharge emphasize that the decision to leave work must occur while the intolerable working conditions exist. In *Montero v. Agco Corp.*,[22] we held that an employee could not bring a claim for constructive discharge when she had left work four months after the harassing behavior had ceased. Likewise, in *Steiner v. Showboat Operating Co.*,[23] we held that an employee could not bring a claim for constructive discharge when the employer had fired the alleged harasser two and one-half months prior to her resignation. "[I]n order to constitute constructive discharge, harassment must be intolerable 'at the time of the employee's resignation.'"[24]

Fielder formally resigned on May 10, 1995, after she had been away from the alleged hostile work environment for over a year. Her last day of work was April 20, 1994, and her last physical presence at the airport was when she boarded the plane with her mother, the previous September, eight months before. On May 10, 1995, she was not subject to "intolerable conditions" at her workplace. She was not subject to any conditions at her workplace, because she was not even there. Fielder, unlike the plaintiff in *Draper*, could not have decided when she quit that "she can't take it anymore." She had not been "taking it" for over a year. Fielder

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22 *Montero v. Agco Corp.*, 192 F.3d 856, 861 (9th Cir. 1999).

23 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994).

24 *Id.* (quoting *Brady v. Elixir Industries*, 242 Cal. Rptr. 324, 328, 196 Cal. App. 3d 1299 (Ct. App. 1987) (emphasis in original)).

cannot reinstate her right to sue for constructive discharge by an official resignation more than a year after she had left work because of the alleged intolerable working conditions. The decision to leave work must coincide with the intolerable working conditions.

As a practical matter, a sexual harassment complaint is likely to generate some ill feeling from the coworker accused of it and others who think the complaint was ill founded. The short statute of limitations Congress imposed advances the important purpose of labor peace. So long as a sexual harassment complaint is pending, the individuals in the workplace are likely to be talking about it at work, avoiding coworkers whom they think are "on the other side," stirring their side up with long, intense, night-time phone calls, worrying about the litigation, and building files to advance their positions. Promotion of labor peace motivates much of National Labor Relations Act jurisprudence.[25] Likewise getting discrimination cases done with promotes labor peace. Effectively repealing the statute of limitations, as the majority does in this factually and legally strained decision, will cause cases to fester and generate friction in the workplace for years, because the claim is never barred. Any contact between the employee and the workplace, even after she has quit working there, establishes a genuine issue of fact for a retaliation claim on the basis that the coworkers probably still do not like her, under today's decision. The majority's decision is contrary to the statute, and contrary to the Supreme Court's construction of the statute in *Delaware State College v. Ricks.*[26]

The majority's decision creates the risk of tremendous unfairness to employers. An employer can be held liable for long past unlawful conduct that it had absolutely nothing to do with. The 300 days does not run so long as some employees may have

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[25] *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996).

[26] *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

bad feelings about the complainant under today's "continuing violation" theory.

The majority's strained decision also imposes extraordinary, and possibly unconstitutional, burdens on workers at a company accused of sexual harassment. Today's decision treats their unfriendliness toward a complainant as retaliation (all the refusal to assist, etc., was long before the 300 days). The majority points to such things as their not wanting the complainant to sit with them in the coffee shop during a break. The only thing management can do to protect itself from the law as so construed is to require the employees to socialize equally with a sexual harassment complainant, regardless of how they feel, and not to say how they feel. Government enforcement agencies will compel management to do that, under today's decision.

The First Amendment entitles people to be free to say what they think about a complainant and to associate with whom they like. Certainly the government can require their employers to prohibit retaliation in the course of workplace duties, such as helping with heavy loads, or refusing to talk to her when the job requires communication. But when they are not performing workplace duties, employees' free speech and associational rights cannot constitutionally be sacrificed by government compulsion to serve the goal of preventing retaliation.[27] The government is not entitled to make people act as though they like each other.

A hypothetical case illustrates why not. Suppose a racist complainant falsely charged a black man with sexual harassment, and told her coworkers that she had filed the false charges to get him out of there because of his race. In any decent workplace, her coworkers would tell her what a terrible person they thought she was, refuse to sit with her at lunch or invite her to social events, and shun her except where work required contact. The statute says that "the employer" cannot retaliate against her "because [s]he has

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[27] *Brooks v. City of San Mateo*, 214 F.3d 1082, 1092-93 (9th Cir. 2000).

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing,"[28] but nowhere does it say that the other employees have to pretend they still like her, lie about their feelings, and continue to socialize with her as though she had not done the evil act. Nor could it under the Constitution. Yet under today's opinion, civil rights enforcement agencies will compel private employers to require that coworkers treat the hypothetical complainant with as much social warmth as they treat other coworkers.

Elimination of the statute of limitations is also another heavy weight piled onto people who want to get jobs. Until the companies are very sure that prospective employees are not dangerous to them, they are likely to avoid hiring them. Employers have done that in the past few years by hiring people as "temps," and treating them as employees of temporary employment agencies, or hiring them for purportedly temporary jobs that end automatically, but are really long probation periods. By increasing the litigation risk to employers today, we further discourage companies from making offers of genuine, full, secure employment. Our decision today teaches practical employers to hire temps or contract the work out.

By inventing facts, and inventing law, we have done considerable harm. I dissent.

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[28] 42 U.S.C. § 2000e-3(a).

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

NO. 98-35511 [FILED Nov. 7, 2000]

JOANNE FIELDER,	)	Appeal from the United
	)	States District Court for the
Plaintiff-Appellant,	)	District of Oregon.
	)	
v.	)	No. CV-95-03067-JPC
	)	
UAL CORPORATION, a Delaware corporation, dba UNITED AIRLINES,	)	John P. Cooney, *Magistrate Judge*
	)	
Defendant-Appellee.	)	

ORDER

Before ALDISERT,[1] KLEINFELD and W. FLETCHER, *Circuit Judges.*

Judges Aldisert and Fletcher have voted to deny the petition for rehearing. Judge Kleinfeld voted to grant the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc and Judge Aldisert so recommends. Judge Kleinfeld voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

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[1] Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

The petition for rehearing and petition for rehearing en banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOANNE FIELDER,	)	
	)	
Plaintiff,	)	
	)	No. CV-95-03067-JPC
v.	)	
	)	John P. Cooney, *Magistrate*
UAL CORPORATION, a Delaware corporation, dba UNITED AIRLINES,	)	*Judge*
	)	
Defendant.	)	

MEMORANDUM OPINION

COONEY, Magistrate Judge:

This is a civil action brought by plaintiff against her former employer. Plaintiff alleges sexual discrimination in employment, retaliation, and wrongful discharge in violation of 42 U.S.C. § 2000e and pendent state claims for sexual discrimination and retaliation under Oregon Revised Statutes Chapter 659, intentional infliction of emotional distress, and breach of contract. The parties executed written consents for entry of final judgment by a Magistrate Judge. 29 U.S.C. § 636(c). Before the court is defendant's motion for summary judgment on plaintiff's Title VII claims, and motion to dismiss plaintiff's state law claims. (#16)

I. FACTS[1]

Plaintiff began working at United Airlines on October 23, 1978. She was a permanent, part-time customer service agent. (Plaintiff's Deposition at 13). Her general duties involved flight preparation, handling of baggage, reservations, and seating of for passengers. (*Id.* at 15).

In 1978, when plaintiff came to Medford, all of her co-worker customer service agents (CSA's) were men with the exception of one female, who was the secretary. (*Id.* at 13-14). She was told by her co-workers that she had taken a job away from a man. (*Id.* at 18, 66). She was teased about her figure, told that she was flat chested, and told that she had a nice rear end. (*Id.* at 18-21). Plaintiff talked to her supervisor, Ed Bausserman, about these incidents. (*Id.* at 22, 215-217).

Plaintiff worked from 1978 until around 1981 when she took a furlough until 1984. (*Id.* at 23). Plaintiff returned to work in June of 1984, and continued to work until April 20, 1994, when she was placed on medical leave at her request. In 1984, when plaintiff returned from her furlough, she was subjected to numerous incidents of sexual harassment. A condom was placed in her mailbox. (*Id.* at 24-25). Male CSAs continually told her that it was her position, as a woman, to have children. (*Id.* 25, 27, 87). Playboy magazines opened to the centerfold were placed in drawers for her to discover. (*Id.* at 25, 143).

In July or August of 1991, a picture of a screw was placed over a bumper sticker on plaintiff's locker to convey the message: "I screw buns." (*Id.* at 25-26). Plaintiff was nicknamed "Buns" by her co-workers. (*Id.* at 47). She acquiesced to the nickname and

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[1] Defendant objects to certain portions of plaintiff's concise statement of facts on the grounds that it is hearsay. Plaintiff argues that other incidents of sexual harassment directed at other females is relevant. While these incidents may be relevant, these facts are hearsay, and therefore, they will be excluded.

considered it a term of endearment. (*Id.* at 47). She also used the nickname. (*Id.* at 48). When plaintiff reported her dislike of the nickname to Mr. Bausserman, the situation was corrected. (*Id.* 48-49).

While Mr. Bausserman was still her supervisor, a co-worker told her in a loud voice, in front of a gate agent, that she had a splotchy forehead because she was on the birth control pill. (*Id.* at 25, 36, 146). During this time, Stan Reynolds made disparaging comments about women, their anatomy, and his desires toward them. (*Id.* at 82; Rossi Depo. at 25). These comments were explicit and vulgar: "great boobs," "I wouldn't use anyone else's cock up her." (Plaintiff's Depo. at 158-159).

Plaintiff complained to Mr. Bausserman about Stan Reynolds' comments. (*Id.* at 83-84, 142). Mr. Reynolds was the acting manager when the manager was gone. (*Id.* at 84, 144-145; Reynolds Depo. 608; Bibler Depo. 16). Stan Reynolds forced plaintiff to unload an extra large dog kennel on her own, resulting in scratches on both of plaintiff's arms. (*Id.* at 51-53).

During the period that Mr. Bausserman was plaintiff's supervisor, Ron Mailho ran the belt loader at its fastest speed, to test plaintiff's mettle. (*Id.* at 54-55, 147-149). As a result, baggage was thrown against plaintiff's legs, physically injuring her. (*Id.* at 149). When plaintiff complained about such incidents, her managers responded: "Guys will be guys." (*Id.* at 53; Rossi Depo. at 45).

Similar behavior was directed toward other female employees. (Plaintiff's Depo. at 94; Rossi Depo. at 23). Both Mr. Reynolds and Mr. Mailho would try and put women in the hardest positions, and Mr. Chmelir "was great at trying to have you do something so fast that it wasn't working smart" (Johnson Depo. at 39).

While Mr. Bausserman was her supervisor, Mr. Chmelir would frequently touch plaintiff's shoulder, back, arms, or hips.

(Plaintiff's Depo. at 150). Mr. Chmelir pinned plaintiff against a departure board with his rear end and wiggled himself against plaintiff. (*Id.* at 277-279). Mr. Bausserman was plaintiff's supervisor until around 1992. (Plaintiff's Depo. at 85).

Prior to 1992, plaintiff reacted with "fear and intimidation" to these incidents and "did not run and tell every time." (*Id.* at 33). In 1992, plaintiff told her co-workers that their prior behavior was unacceptable; it would not longer be tolerated; that it constituted sexual harassment; and that if it wasn't stopped she would consult an attorney. (*Id.* at 48-49). The harassment continued after that meeting. (*Id.* at 281).

During the period from mid-1992 through February 1993, plaintiff received three obscene phone calls. (*Id.* at 38). During the day, before one of the phone calls, a co-worker, Mr. Chmelir, asked plaintiff if she would go to bed with him. (*Id.* at 40-41, 233). Plaintiff was very upset and left to go home immediately after the flight was checked in (*Id.* at 41).

On February 18, 1993, plaintiff reported the sexual harassment to her supervisor, Ted Bibler. The complaint concerned allegations of unwanted touching and a harassing phone call. (Plaintiff's Complaint at 3). Plaintiff reported the counter incident and the obscene phone call to Ted Bibler the following day. (Plaintiff's Depo. at 219). Mr. Bibler held a meeting that same day with the plaintiff, himself, and Mr. Chmelir. At that time, Mr. Chmelir denied making the phone call, and Mr. Bibler advised plaintiff that the matter would be investigated. (*Id.* at 223). Following the recommendation of Mr. Bibler, plaintiff reported the incident to the Medford Police Department.

While a criminal charge was pending against Mr. Chmelir, but before his court appearance, Mr. Chmelir attempted to bid on the same shift as plaintiff. (Plaintiff's Depo. at 200-201; Plaintiff's Ex. 9). On April 7, 1993, plaintiff's attorney wrote a letter to Mr. Bibler requesting that, until the criminal charges were resolved, to

not schedule plaintiff and Mr. Chmelir on the same shift. (Plaintiff's Ex. 9).

Following plaintiff's complaint, Mr. Bibler posted a "briefing item" on the bulletin board about sexual harassment in general. (Johnson Depo. at 30). After talking with plaintiff about a conversation between plaintiff and Mr. Bibler, Ms. Johnson got the impression that Mr. Bibler "wanted to put the whole thing to rest and just let everything that had gone on before — to just be done with it and start over again. And if there were problems, he wanted to be aware of them. If there was not, he wanted it to drop." (*Id.* at 30-31).

After plaintiff complained about Mr. Chmelir, and it looked like nothing was being done about her complaints, Cecilia Johnson also complained to Mr. Bibler about Mr. Chmelir. (Johnson Depo. at 23-24). She reported that Mr. Chmelir asked her to sleep with him, and she refused, and that Mr. Chmelir, on several occasions would come up behind her and rub her neck and move his hands down in front of her chest. (*Id.* at 23-24). When Ms. Johnson told Mr. Bibler about the incidents with Mr. Chmelir, "[h]is reaction was: Has he done anything to you recently? And . . . [she] said, not recently. And he said, I want to know if he does anything to you ever again." (*Id.* at 25). Following her complaint, Mr. Chmelir did not sexually harass Ms. Johnson again. (*Id.* at 26). Ms. Johnson believed that Mr. Chmelir knew that if he did anything to her that she would go to Mr. Bibler. (*Id.* at 50).

After plaintiff reported the telephone abuse and sexual harassment, plaintiff was ostracized by her co-workers. (Plaintiff's Depo. at 190; Kleen Depo. 13:4-12; Rossi Depo. (II) at 19-20). Plaintiff's coat was walked on with muddy foot prints. (Plaintiff's Depo. at 191-192). Mr. Reynolds would withhold assistance on the job, making it more difficult for plaintiff to perform her job. (*Id.* at 159-161, 193-194). Both plaintiff and Mr. Rossi complained to plaintiff's manager, Mr. Bibler, about the retaliation. (*Id.* at 202, 239; Rossi Depo. (I) at 38). Plaintiff believes that Mr. Bibler was

either unable or unwilling to stop this retaliation from co-workers or to ensure a safe working environment for plaintiff. (Plaintiff's Depo. at 202-204, 240-242).

On June 9, 1993, plaintiff's attorney wrote to Mr. Bibler regarding retaliation by co-workers against plaintiff after she reported the sexual harassment. (Plaintiff's Ex.9). The letter stated that, on several occasions, plaintiff reported conduct by other employees that constituted either direct or indirect retaliation against her. (*Id.*). The letter stated that the attitude and behavior of plaintiff's co-workers had changed dramatically towards her, and it was the employer's obligation to maintain a workplace free of such retaliation. (*Id.*). The letter requested that Mr. Bibler address the issue with other employees in the workplace and see that the conduct did not occur in the future. (*Id.*).

Mr. Chmelir confessed to the telephonic harassment and, as a result, entered into a criminal diversion agreement in July of 1993. (Plaintiff's Depo. at 229; Charter Affidavit Exs. 8 & 10; Chmelir Depo. 18-19). Plaintiff was sometimes scheduled for the same shift with Mr. Chmelir and corrections were made as late as the night before the scheduled shift. (Rossi Depo. at 53-54; Plaintiff's Depo. at 241). As a result of the diversion agreement, Mr. Chmelir was unable to work overtime and worked less hours. (Chmelir Depo. at 21-22). Plaintiff repeatedly requested that Mr. Chmelir be kept off her shift. (Charter Aff. Ex. 9). Even when Mr. Chmelir was on the shift which followed plaintiff's, contact was inevitable because "Mark would come into the office . . . not even giving me five minutes to leave my shift." (Plaintiff's Depo. at 205; Charter Aff. Ex. 11).

In August of 1993, a United representative from Eugene held a seminar on sexual harassment at the Medford station. (Reynolds Depo. at 13-14; Bibler Depo. at 14). This was the first training in sexual harassment at the Medford station. (Reynolds Depo. at 13-14). Bill Bruce "exploded" at the sexual harassment seminar, and accused plaintiff of "making the whole thing up" against Mr.

Chmelir. (Plaintiff's Depo. at 182-185). Mr. Bruce had a black belt in karate, and he once brought a long knife into work and said: "I can hardly wait to get some blood on it." (*Id.* at 184-185). This was after the accusation at the seminar. (*Id.* at 185).

Right after the sexual harassment training meeting, plaintiff requested that Mr. Bibler and Nellie Yuret, the United representative from Eugene, assist her with her request for a transfer to another station in Portland or Seattle. (Plaintiff's Depo. at 207-208, 242-243). United Airlines never responded to plaintiff's transfer request. (Plaintiff's Depo. at 208).

During the diversion agreement, co-workers directed their anger towards plaintiff. Ron Mailho told plaintiff that she had her head up her ass. (Plaintiff's Depo. at 98-99, 197-198; Rossi Depo. (I) at 50). Another time, Mr. Mailho said plaintiff was "neurotic and sick." (Rossi Depo. (II) at 12-13 & Ex. E). Mr. Mailho told plaintiff that she was not welcome with other employees at a coffee break. (Plaintiff's Depo. at 98). Mr. Mailho intentionally delayed a flight departure because Mr. Chmelir was not allowed to work on the same shift with plaintiff. (*Id.* at 99-100, 194). Mr. Mailho and Mr. Reynolds blamed plaintiff for scheduling problems related to the diversion agreement. (Rossi Depo. (I) at 50-51). Plaintiff reported these incidents of retaliation to Mr. Bibler on several occasions. (Charter Affidavit. Ex. 9).

United Airlines has a policy of progressive disciplinary action: first, a verbal warning is usually given, then a written warning is given, and then a final warning is given indicating that further misconduct will result in termination. (Bibler Affidavit). In response to plaintiff's complaints, Mr. Bibler gave Mr. Chmelir a final written warning. Furthermore, Mr. Chmelir was not allowed to work on the same shift as plaintiff as a condition of Mr. Chmelir's diversion. (Bibler Affidavit). Plaintiff was satisfied with Mr. Bibler's initial response to her complaint. (*Id.* at 225).

Plaintiff identified three occasions where Mr. Chmelir had contact with her during his diversion. According to plaintiff, Mr. Chmelir met her in the airport doorway and made a growling noise. (Plaintiff's Depo. at 137, 211). On another occasion, plaintiff went to the north end of the airport and saw Mr. Chmelir at the car rental area leaning against an advertising display case. (*Id.* at 206.) There was another incidental contact between herself and Mr. Chmelir as the two were changing shifts. Plaintiff does not claim that Mr. Chmelir engaged in any sexually harassing behavior in these brief incidental contacts. During Mr. Chmelir's diversion, Mr. Bibler told Mr. Rossi that plaintiff was paranoid and should toughen up. (Rossi Depo. (I) at 57, 59-61; Plaintiff's Depo. at 274; Bibler Depo. at 36).

When Mr. Chmelir's diversion agreement was coming to an end, plaintiff tried to set up a meeting with Mr. Bibler, Mr. Chmelir, and other to work out some safeguards if Mr. Chmelir was allowed to work on her shift. (Plaintiff's Depo. at 246-248). Mr. Bibler refused to allow the meeting. (*Id.* at 248). Mr. Bibler told plaintiff that Mr. Chmelir would have to do something else before United would take any further action to protect plaintiff against retaliation. (*Id.* at 249; Rossi Depo. (I) at 57-58).

Ms. Johnson recalls that Mr. Bibler wanted to make sure that if anybody had any other problems to make sure that he knew about it. (Johnson Depo. at 50). Ms. Johnson recalls that plaintiff felt Mr. Chmelir would try to hurt her. (*Id.* at 49). Ms. Johnson did not think Mr. Chmelir would be stupid enough to do something like that, but she didn't know. (*Id.*).

As a result, plaintiff stopped working for United Airlines on or about April 20, 1994. (Plaintiff's Depo. at 89, 187, 250). Plaintiff told Ms. Johnson that she was not going to come back, period. (Johnson Depo. at 52). Plaintiff chose to no longer work for United Airlines because she realized Mr. Chmelir would be able to bid any shift and could bid shifts with plaintiff. (Plaintiff's Depo. at 249-250). Plaintiff indicated that she wanted United Airlines to

guarantee that she would physically be separated from Mr. Chmelir. (*Id.* at 254). Plaintiff wanted to be guaranteed she would be free from harassment by Mr. Chmelir, and that she would not have to work the gate with Mr. Chmelir. (*Id.* at 251). Mr. Bibler's reasons for not agreeing to such demands were that there was no legal or policy basis to deny Mr. Chmelir his right to bid and work whatever shift his seniority would allow. (Bibler Affidavit).

On September 1, 1994, plaintiff, while she was off work on sick leave, went to the airport to escort her mother onto a United plane. (Plaintiff's Depo. at 284-286, 275; Bibler Depo. at 39). Plaintiff claims that she was pulled off the plane, and told, in Mr. Bibler's office, that her presence at the airport was causing upheaval among her co-workers, and that she showed poor judgment in coming out to the airport at all. (*Id.* at 284-286). She indicated the reprimand was public, in spite of the fact that the door was closed, because other employees were around the office and could potentially hear what was being told to her, and because when she was pulled off the plane by Mr. Rossi, Mr. Rossi, in front of her mother and other passengers, told her that Mr. Bibler wanted to talk to her now in his office. (*Id.* at 275, 286-287). According to Mr. Bibler, he did not reprimand plaintiff, but discussed the issue of her being at the airport to assist her mother onto a flight while being off work on a medical leave. (Bibler Affidavit). There is no policy against a United employee with identification escorting a family member onto a plane. (Kleen Depo. at 19-21; Mailho Depo. at 14; Reynolds Depo. at 15-16; Bibler Depo. at 42; Rossi Depo. (II) at 31-32).

Plaintiff was not demoted or denied any opportunity for advancement. (Plaintiff's Deposition p. 283, lines 21-24). Plaintiff claims she was denied an opportunity for a transfer. (*Id.* at 208). Ms. Johnson, one of plaintiff's co-workers, knew that plaintiff had requested a transfer, but plaintiff also expressed to Ms. Johnson that Medford was her home, she was established here, and she wasn't going to leave. (Johnson Depo. at 53-54). Plaintiff knew that she wasn't going to take a position in another city because she felt that

the situation in Medford would carry on in the other city. (*Id.* at 54). Plaintiff had discussed possibly purchasing a condo in Portland. (Johnson Depo. at 53-54, 61). Ms. Johnson transferred to Seattle in the Fall of 1994, when plaintiff was on leave, even though she had less seniority than plaintiff. (*Id.* at 47, 60).

Plaintiff made a claim for workers' compensation on August 18, 1994. This claim was accepted by Alexis Risk Management. The acceptance lists April 20, 1994, as the date of injury. (Plaintiff's Exhibit 1). On May 10, 1995, plaintiff's doctor released her to go back to work. (Charter Affidavit Ex. 2).

On May 9, 1995, plaintiff filed an unlawful employment practices complaint against defendant with the Oregon State Bureau of Labor and Industries. (Plaintiff's second amended complaint at 4). On October 25, 1995, plaintiff filed a complaint in the United States District Court for the District of Oregon. (Docket #1).

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party bears the initial burden of proof. *See Rebel Oil Company, Inc. v. Atlantic Richfield Company*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.*

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th

Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. *Id.* If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is aa genuine issue for trial. Fed. R. Civ. P. 56(e); *Auvil v. CBS "60 minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. *Id.*

III. DISCUSSION

Defendant moves for summary judgment based on the following arguments:

1) the statute of limitations bars plaintiff's Title VII claims[2]
2) the conduct alleged does not constitute a hostile work environment;
3) defendant took appropriate action to address plaintiff's complaints; and
4) the conduct alleged does not constitute retaliation.

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[2] Defendant did not plead the statute of limitations as an affirmative defense, and argued, for the first time in its reply that pre-1991 evidence was barred by the statute of limitation. The court gave plaintiff an opportunity to respond to this argument. In her response, plaintiff argued that the continuing violation theory applied to her claims, and therefore, they were not barred by the statute of limitations. She did not object to defendant raising this argument for the first time in a motion for summary judgment, and plaintiff did not claim any prejudice. Defendant, on the Friday before the Monday oral argument hearing, filed a supplemental memorandum regarding the statute of limitations, arguing that both of plaintiff's Title VII claims were barred by the statue of limitations. Plaintiff did not object or make any claim of prejudice during the oral argument. Absent prejudice to the plaintiff, a defendant may raise the affirmative defense of the statute of limitations for the first time in a motion for summary judgment. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Plaintiff has not claimed any prejudice. Therefore, the court will address defendant's argument regarding the statute of limitations.

Plaintiff argues that:

1) she has established a continuing violation, and, therefore, her claims are not barred by the statute of limitations;
2) the facts establish that she was subjected to a hostile work environment;
3) defendant failed to take prompt and effective remedial action to end the harassment; and
4) she has established that she was subjected to retaliation.

Statute of Limitations and Continuing Violation Theory

Before a Title VII suit may be filed in federal court, a plaintiff must file a complaint with EEOC within 180 days after the occurrence of the alleged violation, or, if the plaintiff initially instituted proceedings with the appropriate state agency, within 300 days of the alleged violation. 42 U.S.C. § 2000e-5; *Mueller v. Los Angeles Fire Dept.*, 637 F.2d 616, 617 (9th Cir. 1980); *See Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1473 (9th Cir. 1989). Plaintiff filed her BOLI complaint on May 9, 1995. Therefore, only those incidents occurring in the period between July 14, 1994 and May 9, 1995 fall within the limitations period. *See Davis v. State of California Dept. of Corrections*, 1996 WL 271001 (E.D. Cal.) at *16. Conduct that took place before the 300 day limitation period is not actionable, unless the continuing violation doctrine applies. *See Selan v. Kiley*, 969 F.2d 560, 564-565 (7th Cir. 1992) (citation omitted).

The Ninth Circuit recognizes two types of continuing violations: 1) a systematic policy of discrimination, and 2) a series of related acts against a single individual. *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990) (citation and quotations omitted). It appears that plaintiff's case is based on a series of related acts against her. The burden of proof is on the plaintiff to show that the continuing violation exception applies. *Davis*, 1996 WL 271001 at *20.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that is within the limitations period." A prerequisite for finding a continuing violation is that there must be some actual violation within the limitations period. *Davis*, 1996 WL 2711001 at *21.

If the plaintiff can identify an actual violation that occurred within the statutory time period, the court must then determine whether the timely violation and the time barred violations are "related closely enough to constitute a continuing violation" or are "merely discrete, isolated, and completed acts which must be regarded as individual violations." *Selan*, 969 F.2d at 565 (citation omitted). Factors to consider in determining whether a continuing violation exists include: 1) subject matter — Do the alleged acts involve the same type of discrimination?; 2) frequency — Are the alleged acts recurring or more in the nature of isolated work assignments or employment decisions?; and 3) permanence — considered the most important factor — Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? *Keenan v. Allan*, 889 F. Supp. 1320, 11371 n.47 (E.D. Wash. 1995), *affirmed*, 91 F.3d 1275 (9th Cir. 1996).

The "purpose of allowing a plaintiff to maintain a cause of action based on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred." *DOE v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994); *See Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993). If a plaintiff knew or should have known that the discrimination was occurring at any time during the limitations period, she cannot later rely on the continuing violation doctrine to overcome that statutory

requirements of filing a charge with the EEOC within 300 days. *Davis*, 1996 WL 271001 at *22 (citations omitted); *Moskowitz v. Trustees of Prudue University*, 5 F.3d 279, 281-282 (7th Cir. 1993). "A claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the (300) day limitation period." *Roberts v. Gadsden Memorial Hosp.*, 850 F.2d 1549, 1550 (11th Cir. 1988). "A knowing plaintiff has an obligation to file promptly or lose his claim." *Sabree v. United Broth. of Carpenters and Joiners Local No. 33*, 921 F.2d 396, 402 (1st Cir. 1990).

Hostile Work Environment Claim

Title VII of the Civil Rights Act makes it illegal for an employer to discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's sex. 42 U.S.C. § 2000e(a)(1). A plaintiff may show a violation of Title VII by proving disparate treatment or disparate impact, or by proving the existence of a hostile work environment. *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1109 (9th Cir. 1991) (citations omitted). The phrase "terms, conditions, or privileges of employment" includes requiring people to work in a discriminatorily hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Sexual harassment is a form of discrimination prohibited by Title VII. *Kishaba v. Hilton Hotel Corp.*, 737 F. Supp. 549 (D. Hawaii 1990), *affirmed*, 936 F.2d 578 (9th Cir. 1991). When an employee sexually harasses a co-employee because of that co-employee's sex, that employee discriminates on the basis of sex. *Id.* at 63. A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. *Id.* at 66.

When the work place is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the condition of the victim's employment and create an abusive working environment, Title VII is violated. *Id.* at 65-67. For sexual harassment to be actionable, the conduct must be severe or pervasive enough to alter the conditions of the victim's employment and create an objectively hostile or abusive work environment; an environment a reasonable person would find hostile or abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Ninth Circuit uses the reasonable woman standard when the victim is a woman or a reasonable person of the same race in a racial harassment claim. *See Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Steiner v. Showboat Operating Company*, 25 F.3d 1459, 1462, *cert. denied*, 513 U.S. 1082 (1995). In addition, the victim must perceive the environment as hostile; the conduct must actually alter the conditions of the victim's employment. *Harris*, 114 S.Ct. at 370.

The conduct does not have to seriously effect the victim's psychological well being. *Id.* at 370-371. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for psychological injury. *Id.* at 371; *Fuller v. City of Oakland California*, 47 F.3d 1522, 1526 (9th Cir. 1995) (citation omitted). It is enough that the hostile conduct pollutes the workplace, making it more difficult for the victim to do her job, take pride in her work, and to desire to stay in her position. *Steiner*, 25 F.3d at 1462.

Whether an environment is hostile or abusive depends on all the circumstances including; the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* No single factor is required. *Id.*

The effect on a victim's psychological well being is relevant to determine whether the victim found it to be a hostile or abusive

work environment. *Id.* Hostile environment harassment is conduct which has the purpose and effect of unreasonably interfering with an individual's work performance of [sic] creating an intimidating, hostile, or offensive working environment. *Ellison v. Brady*, 942 F.2d at 876-877.

A hostile environment exist when an employee can show: 1) that she was subjected to sexual advances, request for sexual favors, or other verbal or physical conduct of a sexual nature; 2) that the conduct was unwelcome; and 3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment. *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Fuller*, 47 F.3d at 1526 (citations omitted). The harasser's conduct must be pervasive and severe. *Ellison*, 942 F.2d at 878. The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct. *Id.* at 878. Plaintiff states a claim of hostile environment sexual harassment when she alleges conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Id.* at 879; *Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir. 1991).

Plaintiff filed her BOLI complaint on May 9, 1995. Therefore, only those incidents of sexual harassment occurring in the period between July 14, 1994 and May 9, 1995 fall within the limitations period. Conduct that took place before the 300 day limitation period is not actionable, unless the continuing violation doctrine applies.

Plaintiff claims that the following incidents took place after July 4, 1994: Mr. Bibler told Mr. Rossi that plaintiff was paranoid and that she should toughen up, plaintiff's request for a transfer was denied, plaintiff was reprimanded by Mr. Bibler for helping her mother onto a flight, and plaintiff's claim of constructive discharge.

There are several reasons why plaintiff's argument fails. First, all of the acts complained of do not constitute sexual harassment. Conduct that constitutes sexual harassment includes: sexual advances, request for sexual favors, or other verbal or physical conduct of a sexual nature. The conduct cited by plaintiff does not fall into this category.

Second, plaintiff cannot show that any acts of sexual harassment occurred within the limitations period. The comments made by Mr. Bibler to Mr. Rossi occurred prior to July 14, 1994. Plaintiff's request for a transfer was made some time before August of 1993, and even though it was never granted or denied, the defendant did not have any opportunity to act on that request after plaintiff left work on April 20, 1994.

Although plaintiff argues that her constructive discharge did not occur until May 10, 1995, when her doctor released her for work, it is clear that plaintiff left work on April 20, 1994, and that she did not plan to return. It is also clear that under either date, plaintiff's claim for constructive discharge based on sexual harassment or retaliation must fail.

On February 18, 1993, after plaintiff complained about the sexual harassment, Mr. Chmelir did not sexually harass her again. There is no evidence in the record of any other sexual harassment that took place after this date. Plaintiff's last contact with Mr. Bibler, which plaintiff claims constituted retaliation, occurred on September 1, 1994, when he allegedly reprimanded her for escorting her mother on the plane.

A plaintiff cannot prevail on a constructive discharge claim if she does not leave work within a reasonable time after last being the subject of discrimination. *Smith v. Bath Iron Works Corp.*, 943 F.2d 164, 167 (1st Cir. 1991) (citations omitted). In *Smith*, the court found that plaintiff's constructive discharge claim was barred because she waited six months after the sexual harassment ended before she resigned. *Id.* at 167. In the cases cited by the *Smith*

court, constructive discharge claims were barred in one case where the plaintiff waited twelve days to resign, and in another, where the plaintiff's claim for constructive discharge, if it is based on sexual harassment, is barred because the sexual harassment ended in February of 1993. Plaintiff's claim for constructive discharge, if it is based on retaliation, is also barred because, if plaintiff did quit on May 10, 1995, plaintiff waited eight months after the alleged reprimand took place before quitting.

Fourth, it is clear from the evidence that plaintiff knew she had a sexual harassment claim in 1992. The evidence shows that at a 1992 meeting, plaintiff told her co-workers that their prior behavior constituted sexual harassment, and that if it didn't stop she would consult an attorney. Since plaintiff knew about her claim, she cannot avail herself of the continuing violation doctrine.

Based on the foregoing reasons, the court finds that plaintiff's claim for sexual harassment is barred by the statute of limitations.

Retaliation Claim

To make a prima facie case of retaliation, plaintiff must show: 1) she was engaged in a protected activity; 2) there was an adverse employment decision; and 3) a causal link between the protected activity and the adverse employment decision. *Wallis v. J.R. Simplot*, 26 F.3d 885, 891 (9th Cir. 1994). As discussed above, plaintiff claims that the following incidents took place after July 4, 1994: Mr. Bibler told Mr. Rossi that plaintiff was paranoid and that she should toughen up, plaintiff's request for a transfer was denied, plaintiff was reprimanded by Mr. Bibler for helping her mother onto a flight, and plaintiff's constructive discharge. The court has resolved all of these claims, except the alleged reprimand.

Plaintiff's retaliation claim fails for two reasons. First, plaintiff cannot use the continuing violation theory for her retaliation claims based on co-worker retaliation that occurred prior to July 14, 1994, because plaintiff knew she had a retaliation claim

as of June 9, 1993. The only incident which occurred within the statutory period was the alleged oral reprimand. The court finds that the alleged oral reprimand does not constitute an "adverse employment action", and, therefore, plaintiff has failed to establish an actual violation within the statutory period. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-1301 (3rd Cir. 1997); *See also Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997).

Dismissal of State Law Claims

Since the court is granting summary judgment on plaintiff's Title VII claims, her pendant state claims should also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

IV. ORDER

Based on the foregoing, it is ordered that defendant's motions for summary judgment on plaintiff's Title VII claims and motion to dismiss plaintiff's state law claims are granted.

DATED this /16/ day of April 1998.

/s/ John P. Cooney
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1397

In The

Supreme Court of the United States

UAL CORPORATION, dba UNITED AIRLINES,

Petitioner,

v.

JOANNE FIELDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED, AND STATEMENT OF RELATED QUESTIONS NOT PRESENTED

The question presented by the petition can be fairly restated as follows:

> Whether the Ninth Circuit correctly held that the discovery injury rule does not bar recovery for otherwise untimely claims where a related continuing discriminatory or retaliatory *act*, or related continuing discriminatory or retaliatory *unlawful employment practice* has occurred within the 300 day EEOC filing deadline.

The single question presented by the petition is narrow, and does not seek review of the following questions resolved by the court below:

> (1) Whether discriminatory retaliation by co-employees may create vicarious liability for an employer that knowingly fails to abate it.
>
> (2) Whether retaliatory acts not rising to the level of ultimate employment decisions or traditional adverse personnel actions may in and of themselves be actionable retaliatory discrimination under 42 USC 2000e-3(a), irrespective of the preexistence of a hostile work environment.
>
> (3) Whether the same discrete act or failure to act by an employer may be simultaneously actionable as both sex discrimination under section 2000e-2(a)(1), and as retaliatory discrimination under section 2000e-3(a).
>
> (4) Whether a constructive discharge may be actionable as sex discrimination under section 2000e-2(a)(1), or as retaliatory discrimination under section 2000e-3(a), where a continuing hostile work environment exists by virtue of the

RESTATEMENT OF QUESTION PRESENTED, AND STATEMENT OF RELATED QUESTIONS NOT PRESENTED – Continued

employer's failure to abate it, combined with subsequent discriminatory or retaliatory acts occurring within the 300 day EEOC filing deadline.

If this Court decides to grant certiorari, it should consider requiring the petitioner to brief one or more of the above unraised issues.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the single statutory provision identified by the petitioner governing timely filing of EEOC charges, the following statutory provisions are also involved:

42 USC Sec. 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) * * * to discharge any individual, otherwise to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex * * *

42 USC Sec. 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges * * *

It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter * * * .

42 USC Sec. 2000e-5. Enforcement provisions

* * *

*(e) Time for filing charges; * * * seniority system*

* * *

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

*(g) Injunctions; * * * accrual of back pay;*

(1) If the court finds that the respondent has intentionally engaged in * * * an unlawful

employment practice charged in the complaint, the court may * * * order * * * any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. * * *

42 USC Sec. 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 USC 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination * * * (42 USC 2000e-2, 2000e-3, 2000e-16), * * * the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 USC § 1988 [Application of Analogous Federal and State Limitations]

The jurisdiction in civil * * * matters conferred on the district courts by the provisions of this chapter * * * for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies * * * statutes of the State * * * shall be extended to and govern the said courts in the trial and disposition of the cause * * *

ADDITIONAL STATEMENT

The respondent adds the following facts, from the record below, and challenges certain misstatements of the record:

A. Fielder's Employment at United and the Nature of Her Claims:

(1) *Scope of the Amended Complaint*: The petition makes the following misstatement of the record at page 7:

> In response to Fielder's claim that the continuing violation doctrine allowed her to recover for alleged incidents dating back to 1984, the district court turned to the three *Berry* factors.

Respondent has not taken the position that she could "recover for alleged incidents dating back to 1984". Her amended complaint specifically alleges that the hostile working condition commenced with the obscene phone calls on February 15, 1993. Her complaint references none of the earlier acts of sexual harassment, intimidation, and retaliation prior to that date. The earlier acts appear in the record in the context of background information presented by both parties during the summary judgment proceedings.

(2) *Linkage of the Continuing Sex Discrimination and Retaliation*: The petition makes the following misstatement of the record at page 13:

> * * * Fielder complained principally about sexual harassment, and to a lesser extent coworker retaliation, before the limitations period, but complained only about the transfer of a coworker and one incident she characterizes as *retaliation* (Bibler's reprimand) that allegedly occurred within the limitations period.

The amended complaint, and the Ninth Circuit's treatment of it, is not an assertion of employer liability for failing to prevent the sexual comments, touching and phone calls. As the petition correctly states at pages 4 to 5:

> Fielder did not claim to have experienced any sexual harassment at all after February 1993, App., *infra*, 71a, but she did contend that several of her coworkers, including Reynolds, retaliated against her *for reporting Chmelir to Bibler and to the police, id.* at 6a, 59a. [Emphasis added.]

Ms. Fielder contends United is liable to her for sex discrimination due to its continuing failure to abate the hostile environment through the readily available means of either isolating Chmelir from her, or by granting her transfer to Portland or Seattle. This *failure to remedy* in April 1994 and after is the discrimination "because of sex", not the sexual comments, touching and phone calls in and prior to February 1993. United's giving the available transfer position to another employee within the 300 day EEOC filing period is linked by her and the Ninth Circuit as the continuing unlawful employment practice because of sex. As the court below stated in *Fielder* at 987 regarding its understanding of the respondent's positions regarding the transfer's continuing violation linkage to *sex discrimination*:

> We turn now to United's refusal to transfer Fielder. The refusal to transfer her may be evidence that United failed to take steps reasonably calculated to remedy a hostile work environment, *see Burrell, 170 F.3d at 955,* and this constitutes an overt act. Fielder expressed a willingness to move to a different city so that she could continue to work for United. She offered to remedy the problem by transferring, but United declined to take any action, thereby maintaining the *status quo* hostile environment. The brute fact is that a person with less seniority received the transfer. The transfer issue, too, presents a jury question *on the issues of discrimination and retaliation.* [Emphasis added].

Similarly, it is the *failure to remedy* the co-worker retaliation *following* her report to the employer and the police in February 1993 that is basis of her retaliation claims, not

the comments, refusals to coordinate duties, and ostracizing by her colleagues *per se*. United's giving the available transfer position to another employee within the 300 day EEOC filing period, and the effective revocation of her gate and workplace access privileges via the "poor judgment" reprimand, are linked by her and the Ninth Circuit as the continuing unlawful employment practice of retaliation both directly by Bibler (who is United), and indirectly in catering to co-workers who objected to Ms. Fielder's mere presence within the 300 day EEOC filing period. As the court below stated in *Fielder* at 986-87 regarding its understanding of the respondent's positions on the reprimand's continuing violation linkage to *unlawful employer retaliation*:

> It is also a disputed issue of fact whether Bibler's reprimand encouraged retaliatory behavior against Fielder by her co-workers. * * * If a jury finds that Bibler's reprimand was an act of retaliation, it becomes an issue of fact whether the retaliation was of the same kind alleged before the 300-day period. The retaliatory acts by management, before the period of limitations, were Bibler's refusal to prevent M.C. from bidding onto Fielder's shift before the diversion agreement, acting manager S.R.'s refusal to give her required job assistance and supervisor R.M.'s screaming at Fielder that she had her "head up her ass," telling her she was neurotic and sick and later telling her she was not welcome in the airport coffee shop. * * *

As the court below stated in *Fielder* at 987 regarding its understanding of the respondent's positions on the transfer's continuing violation linkage to *unlawful employer retaliation*: "The transfer issue, too, presents a jury question on the issues of discrimination *and retaliation*." (Emphasis added.)

(3) *Scope of the Remediation Sought from United*: The petition makes the following misstatement of the record at page 5:

> In April 1994, Fielder allegedly became concerned that Chmelir might attempt to bid onto her shift once his criminal diversion agreement expired. She claims that she discussed this concern with Bibler, seeking his assurance that Chmelir would be denied access to the same shifts that she was working."

In April 1994, Ms. Fielder did not demand that Chmelir be "denied access to the same shifts that she was working". She knew Bibler would not do that absent a criminal court order. As the letters of her first lawyer, James Mueller, successfully demanded, in 1993, before the criminal court diversion was in effect, Ms. Fielder had an employment expectation that the criminal offender would be isolated from her. Hence, she sought to make an alternative demand on Bibler in April 1994 that if Chmelir was allowed to work on her shift, that at least United should make reasonable efforts to keep him away from her during such shifts. As the majority noted in its recitation of the facts at *Fielder* at 980-81:

> Fielder went to Bibler and asked him "please, when the diversion agreement is up, please keep him away from me. I'm very much afraid of him." E.R. at 15. When M.C.'s criminal diversion program was coming to an end, she tried to arrange a meeting with Bibler, M.C. and others to work out an agreement regarding M.C.'s conduct if he were allowed to work on her shift. Fielder testified that she "wanted to iron out some safeguards for me, so that I could feel comfortable with M.C. on my shift. I had finally realized that there was nothing else I could do to keep him off of my shift. *So I thought, perhaps, if we have some concrete rules and regulations on paper, that everyone agrees to and signs, that we could work together.*" E.R. at 17. Bibler refused to hold the meeting. * * * Fielder was warned by M.C.'s diversion officer that he is "one of the scariest of his types, because he's smart enough

> to walk with one foot on both sides of the line." Plaintiff Depo. at 252. *Fielder testified that because of that statement and her past experiences, she was extremely worried that he might hurt her.* As a result of Bibler's refusal to have the meeting or otherwise guarantee her safety, Fielder went on medical leave April 20, 1994. She told Johnson she was leaving and that "there was just too much that had gone on, and she would not work at the Medford station again." E.R. at 27. Because her request for transfer was still pending, it is unclear if Fielder meant she would never work for United again or not in United's Medford station.

B. Proceedings Below

The dissenting judge in the proceedings below neither advocated, nor even mentioned, the appropriateness of application of the *Berry* factors to hostile work environment cases. Indeed, his dissent was most stinging over conflicting views with the majority as to the facts, not the law. The dissent stated in *Fielder* at 993:

> The majority is simply making up facts, simply making them up, to concoct a reason to get around the statute of limitations, when it says that "United's refusal to transfer Fielder" during the 300 days was one of "two overt acts" within the 300 days that would "trigger the operation of a continuing violation theory * * * "

The dissent opinion may add moral support to the petitioner in its cause before this Court. But it offers little help on what the law is or should be for continuing violation jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH OTHER CIRCUITS' NARROW APPROACHES TO THE CONTINUING VIOLATION DOCTRINE

Based upon the thorough and compelling petition as to the existence of a profound conflict within the circuits, and even within the panels of the circuits, there is no good faith basis upon which the respondent can argue the writ should not be granted on this ground, save one: The petition simply fails to present the scope of questions for review that should be before this Court to do justice to the limitations issue in the hostile work environment context of this case.

II. THE DECISION OF THE COURT OF APPEALS IS NOT ERRONEOUS

A. Overview of the Ninth Circuit's Test of Relatedness: As to the ground of erroneous decision as the basis for granting the writ, it is insufficient. The Ninth Circuit single prong rule that the continuing violation doctrine applies to allow actionability on otherwise untimely wrongs if they are closely related acts to those which are timely is strikingly in conformity to the decisions of this Court, both as to substance and as to simplicity. (See Section III.C. below) As the majority below articulated its rule in *Fielder* at 987-88:

> Generally, to determine whether the continuing violation doctrine applies, the question boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough to the acts outside the limitations period.

(Citation, ellipses and brackets omitted.) This single prong test contains the first two prongs of the *Berry* rule, similarity and continuity. It is the third prong of the *Berry* test, as misconstrued by the later panels of the Fifth

Circuit and other courts since *Berry* itself, that should earn the disapproval of this Court for effectively eviscerating the continuing violation exception to timeliness with the wholly distinct injury discovery rule. Indeed, factor three of the *Berry* rule, which was explicitly formulated as a part of a non-exclusive test solely for measuring *relatedness*, has for many courts become a single prong test of both *timeliness and repose*. As the petition itself unwittingly reveals in its comprehensive review of diverse circuit law, outside of rote repetition of its first two factors, the *Berry* rule is now only its third prong. Indeed, some courts, attracted by the illusory *Berry* bright line, simply demure to the existence of the first two factors, and dismiss actions on a hostile environment 180 or 300 days from its inception.

Figuratively, some courts deploy the "most important" *Berry* prong in a way which views a hostile environment as nothing more than another "discrete act" in the form of a shrink-wrapped collection of words and acts which come in two measurable maximum sizes: the 180 day pack, or 300 day pack. Each plastic package bears a clear expiration date for being forever discarded, which is 180 or 300 days from the date a woman first felt herself to be a victim. If a woman has been groped each day for a calendar year in a 180 jurisdiction, there are three separate and distinct packages, the first two having 180 units each, and the third with only five units. The *Berry* prong then dictates that the first two packages are dismissed as stale. The smaller third pack is then scrutinized for severity, and easily dismissed if five episodes are insufficient. The first two 180 day packs may well be used as "background information", but not as elements of a current violation to allow recovery for the expired claims. By contrast, the Ninth Circuit will allow a jury to open and empty all three packages into a single trial record, and award relief for every act of groping tolerated by the employer.

B. The *Berry* Rule as Originally Formulated and First Tested:

In 1983, the Fifth Circuit was a leader, if not *the* leader, among the circuits in expanding the use of statute of limitations exceptions to protect the classes identified by Title VII as the historical victims of discrimination. The *Berry* decision relied upon Fifth Circuit precedents, and those of other circuits, in bolstering its jurisprudence that the EEOC administrative filing deadline could not be viewed as restrictively as a true statute of limitations, either in measuring the existence of a claim or the time for which a remedy could be awarded. The *Berry* court explained the following at 979-80, and in note 12:

> The courts, however, have frequently utilized the theory of a "continuing violation" in applying this limitation. This theory, the precise contours and theoretical bases of which are at best unclear, relieves a plaintiff who makes such a claim from the burden of proving that the entire violation occurred within the actionable period. To establish a continuing violation for these purposes it is said that the plaintiff must show "a series of related acts, one or more of which falls within the 180 day period. . . . " B. Schlei & P. Grossman, *Employment Discrimination Law*, 232 (Supp.1979); * * *
>
> * * *
>
> The theory may also be relevant to a plaintiff's remedy, for it has been stated that "once having shown discrimination continuing into the actionable period, . . . the plaintiffs may also recover for portions of the persistent process of illegal discrimination that antedated the limitations period. * * * Such recovery, however, has been limited to a period of two years prior to the filing of a charge with the EEOC. 42 USC § 2000e-5(g). * * *

In distinguishing the effect of the EEOC filing deadline from the temporal limitations on available remedies, the Berry court explained at note 12:

> This Court held in *United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir.1973),* that the "limitations period" applicable to an award of back pay relief *was not the 180-day period (90 days at that time) in which an EEOC charge must be brought.* It held that Title VII was silent on the proper period and looked to the analogous state statute of limitations to determine what length of time was appropriate. As noted below, Congress amended Title VII in 1972 to limit back pay awards to a period of two years before the filing of a charge with the EEOC. *42 USC § 2000e-*5(g).

This invocation of *United States v. Georgia Power Co.*, effectively finding a statute of limitations of two years before even getting into the application of continuing violation theory to extend the reach of claims and remedies even beyond, is particularly important in understanding the *Berry* court's reasoning. The Fifth Circuit in *Georgia Power* decided as a matter of first impression for itself that, even prior to the 1972 amendments, the EEOC filing deadline could not be used to limit the claim for relief or the period for which damages were awardable. In rejecting the same argument now made by UAL in its petition, *Georgia Power* held as follows at 922-24 that the analogous two year state back pay limitations should control, and that in addition to the nature of a continuing violation, the discovery injury rule "too" could be considered:

> The limitations period to be applied under Title VII is a question of first impression upon which the statute itself is silent. Though private complaints must be filed before the EEOC within 90 days, we cannot agree with the company that this period is the proper measure. This deadline is designed primarily to enhance the possibility

> of informal, out-of-court resolution of employment discrimination complaints through prompt administrative action. It is in no sense a limitation on the period for which one may receive back pay relief. Employment discrimination may as readily be a continuing course of conduct as a single event. Then *too*, an affected individual may not be aware of the discriminatory impact of certain employment practices until a pattern emerges as a result of the cumulation of numerous events over a substantial period of time. The remedial purposes of the Act would be frustrated were financial redress to be always limited to the 90-day period preceding the filing of a complaint.
>
> * * *
>
> Title VII and similar statutes created new causes of action which did not exist at common law or under state statutes. In respect to those causes of action which have no close analogies in state law, civil rights statutes have generally been held governed by the limitation on liabilities created by statute. * * * However, where federal laws create rights to back pay as part of general remedial relief, courts have generally applied the appropriate state statute of limitations governing actions for unpaid wages.

Secondly, in relying upon the prior Fifth Circuit case of *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir.1980), the *Berry* court set the stage for use of the continuing violation theory to expand not just the timeliness of claims brought within the EEOC filing deadline, but to expand the timeliness of claims beyond the two year statute of limitations period. *Crawford* at 1309 (the page invoke by *Berry*). It is against this well-established jurisprudence in the Fifth Circuit that the meaning and application of the *Berry* factors should now be understood.

After the *Berry* court expressly traced its jurisprudence as rejecting the EEOC filing deadline as being synonymous with a statute of limitations, it grappled with the problem of how to decide what kinds and complexions of "discriminatory acts" are "related closely enough" to those raised in the EEOC charge. The object of the analysis was to determine whether acts or injuries occurring up to two year before the charge can fairly be understood to have been encompassed within the charge. The *Berry* court explained the factors were to be used *for identifying relatedness, not timeliness*. Under the facts of the case it was remanding, the inquiry concerned not an Equal Pay Act claim as such, but a Title VII claim of assignment of "unequal work" to the plaintiff, because of her sex. Her claim was that she was given a heavier workload than male professors throughout the entire period of her employment contract, both before, during and after the filing of her EEOC complaint. However, the *Berry* court viewed the record below as too incomplete *in understanding exactly which assignments, duties and responsibilities may have been unequal*, and which might have been equal with the male professors. The *Berry* court focused on the need for a record portraying the continuity and similarity of tasks, or conversely, which alleged tasks or assignments were not a part of the pattern at all, but might instead be "discrete acts". The *Berry* court explained at 980:

> The court correctly construed the discharge, *per se*, as not constituting a continuing violation which would have extended the time for filing. It was a discrete act of discrimination, and Berry was obliged to seek relief from it within the statutory 180-day period. *Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980); Chardon v. Fernandez, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981).* Nor could the work load and salary discrimination alleged by Berry following LSU's decision not to rehire her, which are discussed below, transform this action

> into a continuing violation. * * * Similarly, LSU's failure to rehire was a discrete act which was not part of a continuing violation.

Instead, the *Berry* court looked to whether the unequal workload might be a "continuing violation in and of itself". The *Berry* court never even questioned the continuing actionability of any pattern which had continuity and similarity. For example, the *Berry* court noted that discriminatory compensation which repeated from one paycheck to another would be a continuing violation, irrespective of whether the employee knew from the first check that discrimination was at work. In such a case, the court would not be concerned with the EEOC filing deadline as limiting how far back the claim or remedy would reach – that would be the function of the statute of limitations (two years in Georgia). The *Berry* court stated at 980-981:

> To the extent that Berry's Title VII claim is not that she suffered salary discrimination of the Equal Pay Act variety, but "work load discrimination" *per se*, which we have held not to be actionable under the Equal Pay Act, we are unable to determine whether she has made out a continuing violation. * * * This issue, although raised by Berry, was not focused on by the parties or the court, leaving the record devoid of potentially important facts and legal argument on the point. Thus, we also remand the question of whether the "work load discrimination" of which Berry complains constituted a continuing violation extending into the 180-day period.

It was only at this point that the *Berry* court formulated the Fifth Circuit's three prong test, remanding the case for its application as a means of determining relatedness. The court stated at 981-82:

> Courts have not formulated a clear standard *for determining when alleged discriminatory acts are related closely enough* to constitute a continuing

> violation *and when they are merely discrete*, isolated, and completed acts which must be regarded as individual violations. * * * This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, *which we discuss, but by no means consider to be exhaustive.* * * * As noted, the particular context of individual employment situations requires a fact-specific inquiry by a trial judge which cannot be easily reduced to a formula. We feel, however, that consideration of the above factors *will generally be appropriate*, and we leave their application here, as well as whether trial on the merits is required for their resolution, in the first instance to the district court.

(Emphasis added, citations and footnotes omitted.)

Had the *Berry* court used what is now called the "*Berry* rule", Professor Berry's Title VII "unequal work" claim would have easily been dismissed with the observations that this condition commenced, and was known and complained about by her long before the EEOC filing deadline. This result would have been repugnant to analysis of the *Berry* panel. Indeed, the first reported try out of the *Berry* rule within the Fifth Circuit resulted in a futile exercise of logic to give wide berth to the third prong in the context of a hostile work environment claim, and as with the *Fielder* decision, resulted in biting dissent against the majority for its obviously strained effort to avoid its application. That case was *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), unmentioned by the petitioner, but cited by the majority in *Fielder* at 986. Like Ms. Fielder, Ms. Waltman was sexually harassed by male co-workers, and she complained about it to her supervisors repeatedly far outside of the EEOC filing deadline. Employer investigations and reprimands were undertaken, multiple offenders were involved, she demanded shift transfers away from harassers, workers

were assembled to learn the employer's sexual harassment policies, and the overt sexual acts ceased. These events all unfolded in 1982, 1983, and 1984, and until she finally resigned in 1985 after getting mental health treatment.

The district judge counted back the days from the EEOC filing, and arrived at cut-off date for actionability in October 1984, finding all of the acts in 1982, 1983 and the first ten months of 1984 to be stale. The *Waltman* majority, however, was undeterred by *Berry*, though giving that case great attention. First, the majority stopped just short of finding Berry inapposite and outdated by this Court's decided determination in the hostile environment arena, stating at 476:

> It is noteworthy that since this court's decision in *Berry*, the Supreme Court decided *Meritor Savings Bank*, which established that a plaintiff can bring a claim for sexual harassment based on acts that created a "hostile environment." The *Meritor Savings Bank* decision is relevant to the continuing violation theory because a hostile environment claim usually involves a continuing violation. In a hostile environment, an individual feels constantly threatened even in the absence of constant harassment. Thus, in looking at the frequency of harassment, the focus should not be a mechanical calculation. Rather, in light of *Meritor Savings Bank*, the court should review the pattern and frequency of the harassment and determine whether a reasonable person would feel that the environment was hostile *throughout the period that formed the basis of the plaintiff's claim.*

(Emphasis added.)

Secondly, the *Waltman* majority distinguished use of the third *Berry* prong as a measure of "permanence" between discrete single acts such as notification of denial of a promotion and the existence of a hostile work environment. It was at this juncture that the majority either

could not grapple with or tolerate use of the third prong to affirm dismissal of Waltman's multi-year ordeal. For in spite of clear evidence that Waltman had long since realized and complained about the hostile environment, and the failure of the employer to abate it, the majority refused to reverse, cryptically stating at 476:

> Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated. We find that in the instant case, there is a material issue whether the acts of sexual harassment, had the *Berry* quality of "permanence" that would alert Waltman that her rights had been violated.

Understandably, the dissent found the majority to be easy prey on grounds of the *Berry* third prong if understood to be a factor of timeliness rather than relatedness, which is how the majority unfortunately discussed it. The dissent stated at 487, note 14:

> I also disagree with the majority's holding that Waltman may prove a continuing violation of Title VII so as to avoid its 180-day limitations period. The impact in this case is not significant, because one or two physical incidents involving her occurred within the 180-day period. *If her claims are actionable, no limitations bar exists.* The majority's holding, however, points up a serious inconsistency in Waltman's claim. How can she have been so *unaware* that her environment at IPCO was pervasively and severely hostile, that

> a continuing violation occurred? Unlike *Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986)*, and cases where the discriminatory conduct is hidden from the plaintiff, Waltman had to know that she was being psychologically abused. If she did not, the credibility of her claim diminishes.

(Emphasis added.)

Thus, like so many of the courts referenced in United's petition, the *Waltman* dissent used *Berry* factor three in shrink wrapping the victim's environment into two discrete packages on either side of the EEOC filing deadline. The first package standing alone was stale, and could thus be dismissed. The second package contained only "one or two physical incidents", and thus lacked the severity and pervasiveness when viewed standing alone. And, said the dissent, even if these physical incidents were severe enough, they still could not be used to link the first package with the timely second one, but would simply be actionable on their own.

C. The *Berry* Rule Two Decades Later in the Fifth Circuit: What is most significant about *Waltman* is not the majority's failure or refusal to apply the third factor, but how the dissent would have used it to isolate continuing hostile environment claims into discrete periods by deploying the *Berry* third prong as a dispositive discovery injury rule. Some circuits, including the Fifth Circuit in a recent case, have used the third *Berry* prong as a discovery injury rule which begins the clock running not on the last overt acts of harassment, but on the earliest ones. Petitioner puts heavy emphasis on *Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A.*, 139 F.3d 532, 537 (5th Cir. 1998), and respondent does likewise to demonstrate how courts now deploy the *Berry* discovery injury prong to start the clock on hostile work environment cases *even before the unlawful employment practice claim has accrued* under Title VII. To understand the perversion of the *Berry* prong into a bar far more onerous than even the harshest application of the discovery injury rule, three

settled aspects of Title VII actionability must be highlighted.

(1) *Acts of Sexual Harassment and Co-Worker Retaliation are not Actionable Until the Employer Commits the "Unlawful Employment Practice" of Failing to Remedy*: It is by now well settled that even the most offensive sexual acts and the resulting hostile work environment are not actionable unless and until (a) the employer knows of, and (b) fails to take the necessary steps to remediate it. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998). As there is no employer vicarious liability for the unsanctioned acts of coworkers, the failure to remediate after chargeable knowledge of the hostile working conditions is an indispensable element of unlawful employment practice claims. As the court below stated in *Fielder* at 985: "Employers may be held vicariously liable for failing to remedy sexual harassment by employees when management knew or should have known of the harassing behavior." Indeed, Title VII restricts claims only to the "employer", and provides no cause of action against the co-employee harasser himself. *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587 (9th Cir 1993) ("Because Congress assessed civil liability only against an employer under Title VII, this court has held that "individual defendants cannot be held liable for back pay"); and *Gregory v. Daly*, 243 F.3d 687, 689 n. 1 (2nd Cir. 2001) (holding that individual supervisory employees may not be held liable under Title VII).

(2) *There is No Title VII Hostile Environment Claim Absent Both Objective and Subjective Severity:* While the subjective state of mind of the victim is a requirement of the severity factor, the severity element of hostile work environment has both a subjective and objective requirement. As the court observed in *Gregory v. Daly*, 243 F.3d 687, 691-92 (2nd Cir. 2001), an actionable hostile environment is one "(1) that is "objectively" severe or pervasive – that is, if it creates "an environment that a reasonable person would find hostile or abusive" [the "objective" requirement], * * * and (2) that the plaintiff "subjectively

perceives" as hostile or abusive [the "subjective" requirement]", citing *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) ("Conduct that is not * * * objectively hostile or abusive * * * is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, * * * there is no Title VII violation.)

(3) *Neither the Discovery Injury Rule, nor any Other Time Trigger, Has any Application before the Unlawful Employment Practice is Complete*: Where federal statutes are silent on a limitations period, there can be competing principles and rules on what the period should be, and what events or knowledge are required to commence the clock. "How long is too long is, of course, a matter of judgment based on experience, and * * * Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue". *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Nonetheless, it is the simple but "cardinal principle that a limitations period does not begin to run until the cause of action is complete." *Rotella v. Wood*, 528 U.S. at 559, n. 4. That the discovery injury rule is effective upon "discovery of the injury, not discovery of the other elements of a claim" *Rotella v. Wood, 528 U.S. at 555, is immaterial where the "other elements" have yet to occur.*

With these hopefully solid premises in mind, it is stunning that the Fifth Circuit in Webb, and the petitioner here, unhesitatingly conclude that the third Berry prong can effectively begin the running of the Title VII limitations period simply when the plaintiff subjectively considers herself a victim, before she has even complained to the employer, where the employer brings prompt remedy to the complaint, and the cause of action is not yet complete. Here are the facts which the plaintiff in *Webb* at 535 alleged happened to her before she ever reported them to the employer such as to trigger employer liability:

> Webb alleges that Mack began sexually harassing her in the spring of 1991, when she began working as his secretary. * * * Mack's offensive conduct included touching Webb on the shoulder when he spoke to her and standing so close

> to her that he would rub against her shoulder. * * *
>
> In January of 1993, both Webb and Mack, together with other CSANT personnel, attended a business meeting in San Antonio. According to Webb, late one evening at a bar Mack approached her, hugged her, and whispered his hotel room number into her ear several times. Mack allegedly asked Webb to meet him there. Later, after everyone had left the bar and returned to the hotel, Mack telephoned Webb in her room and asked why she had not come to his room. * * *
>
> In February of 1993, Mack called Webb into his office. According to Webb, Mack asked her to close the door to the office and to sit on his side of the desk. Webb complied with this request. Mack then discussed several problems that he was having related to CSANT and conveyed to Webb that he was "feeling down." * * * Webb then stood to leave, at which time Mack thanked her for listening and allegedly placed his hand on her leg and touched the inside of her thigh under her skirt. Before January of 1995, Webb had not complained to any CSANT personnel regarding Mack's behavior.

Thus, no matter how serious this sexual harassment by Mack is considered to be, the law is clear that no Title VII cause of action for an unlawful employment practice could have been complete until Webb notified her employer or otherwise demanded relief. Yet, deploying the third *Berry* factor, the *Webb* court at 538 concluded as a matter of law that the Title VII limitations period was triggered by the unreported incidents in 1993:

> Here, the summary judgment evidence reflects that Webb was immediately aware of the severity of Mack's conduct in January and February of 1993. The district court based its decision on Webb's own deposition testimony describing

> her perception of Mack's conduct. Webb stated that she knew that Mack's January 1993 conduct was sexual in nature when he tried to get Webb to come to his hotel room in San Antonio. Further, she stated that she was offended by his behavior. Webb also understood Mack's conduct at the February 1993 meeting to be a sexual gesture. After this meeting, Webb was "shocked and frightened." Even if the January incident at the bar and hotel in San Antonio was insufficient to put Webb on notice that her employment might be affected by Mack's conduct, when the incident in Mack's office occurred only weeks later, Webb was on notice that Mack's conduct would affect her employment. Based on this factual predicate, we agree with the district court that Webb needed no additional facts after these two encounters to understand that Mack was sexually harassing her. Webb's full knowledge of Mack's acts in January and February of 1993 therefore triggered Webb's duty to assert her rights.

The court held the claim untimely despite the legal conclusion at 536 that "Dr. Mack could not be held individually liable because he did not qualify as an 'employer' under Title VII", without any express legal conclusion that the 1993 incidents met the objective requirement of severity and pervasiveness, despite the fact that she had not asked the employer to abate Mack's conduct, and with no analysis whatsoever as to whether any actionable hostile environment had ever existed, much less whether it persisted into 1995. Assuming the correctness of the recited facts, no limitation argument at all was necessary to dismiss Webb's claim. Instead, the court could have, and should have ruled that she substantively had no Title VII claim because no hostile environment existed at all either when she complained to the employer, or within the EEOC filing time. The court simply should have ruled that by the time she triggered

any employer responsibility with her complaints, no hostile condition existed for the employer to remedy.

Yet, it is precisely seizure on the illusory bright line of the third *Berry* factor that leads courts to ignore the most fundamental and substantive legal principles of hostile work environment claims. The trial court, and the petition in this case demonstrate exactly this pitfall. At page 13 of the petition, United correctly recites that:

> Unlike the plaintiff in *Webb*, who apparently did not appreciate during the limitations period that her supervisor's behavior might be violative of Title VII, Fielder specifically complained of sexual harassment to both her coworkers and her supervisor Bibler long before the limitations period ran. *Id.* at 58a. Shortly thereafter, Fielder retained an attorney, who advised United during the limitations period that he believed Fielder was being retaliated against. *Id.* at 4a-5a, 7a.

Neither the district court below nor the petitioner here gave any significance to the facts that she neither had nor claimed any right of action against United for an unlawful employment practice for the 1992 and 1993 *sexual conduct* of Chmelir or Reynolds precisely because United did remedy that conduct after she complained in February 1993. Instead, using the third *Berry* prong, petitioner argues the clock began running with the lawyer letters, irrespective that she had no action against either her individual co-worker or United at that time.

D. The *Berry* Rule and its Even More Harsh Applications in Other Circuits: The petition meticulously documents that the third *Berry* prong, or its analog, have predominated the limitations jurisprudence of several circuits, in some instances where the third prong, without more, is *the* test. The petition unabashedly depicts this, correctly referencing the third *Berry* prong as the "notice rule" it has become in its several variants, in the following analysis:

[*At page 14*:] The Third, Sixth, Tenth, and Eleventh Circuits have applied the *Berry* factors in the same manner as the Fifth Circuit, placing particular emphasis on the third factor – whether the degree of permanence was sufficient to put the plaintiff on notice of her duty to prosecute her claim.

[*At page 15*:] The First and Seventh Circuits, and the Federal Circuit in a related context, have each effectively boiled *Berry* down to a one-factor test that permits the continuing violation doctrine to be invoked only if a reasonable person in the plaintiff's position would not have immediately appreciated the unlawful nature of the conduct antedating the limitations period.

[*At page 12, note 2*:] The Second Circuit has not acknowledged the *Berry* test, but its own approach to the continuing violation theory closely parallels the three-factor *Berry* analysis. * * * See *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) ("There is no reason to defer the accrual of [plaintiff's harassment] claim to the time she received notice of all discrete acts that might make up her discrimination claim.").

[*At page 16, note 3*:] The notice rule of the First, Seventh, and Federal Circuits is consistent with this Court's "emphatic" guidance that causes of action accrue, and the limitations period begins to run, on the plaintiff's "discovery of the injury, not discovery of the other elements of a claim." *Rotella v. Wood, 528 U.S. 549, 555 (2000).*

[*At page 17*:] Under the notice rule of the First, Seventh, and Federal Circuits, evidence that the plaintiff perceived herself to be a victim of harassment before the limitations period expired will be fatal to a continuing violation claim.

Indeed, to show how far the *Berry* third prong is permeating the federal judiciary, petitioner identifies only one circuit as approaching the permissiveness of the Ninth Circuit, noting on page 18, note 4 the "last incident of harassment" rule of the Eighth Circuit.

III. THE SCOPE OF ANY "CONTINUING VIOLATION" EXCEPTION TO SECTION 706(E) IS AN IMPORTANT AND FREQUENTLY LITIGATED ISSUE, BUT THE TEXT AND LEGISLATIVE HISTORY OF TITLE VII ITSELF PROVIDES THE GUIDANCE FOR AFFIRMING THE DECISION BELOW

The petitioner is nowhere more incorrect than when it contends at page 20 that the "broad continuing violation exception adopted by the Ninth Circuit is inconsistent with the plain meaning and purpose of Section 706(e). The statute does not expressly provide an extended limitations period for continuing violations of Title VII." Furthermore, the petitioner is wrong in questioning whether "some limited form of a continuing violation exception could be grafted onto the statute" consistent with Congressional intent and this Court's precedents, other than "the doctrines of equitable tolling and equitable estoppel, and the discovery rule", and then only if "strictly enforced, subject only to certain narrow exceptions". *Ibid* at 22. No fair reading of this Court's cases can sustain the petition's assertion at page 23 that the Court "has consistently refused to recognize an equitable tolling rule, like the continuing violation rule of the court below, that would extend the limitations period for putative plaintiffs who knowingly fail to prosecute their claims in a timely fashion." Both the text of Title VII and the legislative history urge a far less restrictive approach than that urged by petitioner, and adopted by some circuit panels under the misguided constructions of the rule adopted by the *Berry* court in 1983.

This Court fundamentally must resolve the issues raised by the petition, today or another, by one of two approaches that currently predominate for making the complex and tough choices in limitations law. Judicial choices are necessitated because of Congress' venerated and determined view that the judicial branch is better situated than the legislative to wisely formulate and apply limitations rules of decision to effectuate the profound political, legal and cultural values insisted upon by this nation. Were Congress to have delegated this crucial governing power (*e.g.*, 42 USC sec. 1988) to the executive branch, this Court would be firm in its jurisprudence that the executive must vigorously embrace this delegated power. Yet, this Court is hesitant in accepting the delegation. The power is there, the legislative guidance is there. The Constitution has reserved Congress' legislative veto should the Court go too far, but as shown below, that veto has always been used when this Court hasn't gone far enough in permissively adjusting time limitations for effectuating civil rights values.

A. Congressional Guidance: In addition to its own initiatives in doubling EEOC filing deadlines from 90 to 180 days, with most plaintiffs being legislated into 300 day states, Congress has at least twice amended Title VII to reduce unjust case fatalities at the hands of restrictive time limitations.

(1) In 1972, Congress amended the 1964 Civil Rights Act to allow back pay awards to two years, preventing some courts from continuing to use EEOC filing deadlines as the limitations period *for what was then the only compensating money judgment a plaintiff could win. Act Mar. 24, 1972*, P.L. 92-261, 86 Stat. 113 (amending 42 USC sec. 2000e-5(g)(1)). It is this amendment, in conjunction with the delegation of 42 USC sec. 1988, that the Court should now find to be the federal two year statute of limitations for the award of any money judgment under Title VII (other than costs and fees), i.e., back pay and punitive damages provided under 42 USC sec. 1981a for non-economic injuries to Title VII plaintiffs. (See below.)

(2) With the Civil Rights Act of 1991, Congress amended 42 USC sec. 2000e-5(e)(2) to expand the time limitation within which an employee could challenge, and thereby be compensated for, a discriminatory seniority policy. Overruling *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which held the EEOC filing deadline to be triggered on the date a facially non-discriminatory policy is "adopted", Congress dramatically extended the limitations trigger to the latest date of when the policy "is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application" of it. Congress was unpersuaded by the *Lorance* Court's balance of interests and rationale grounded in *Delaware State College v. Ricks*, 449 U.S. 250.

Also it must be noted that with the Civil Rights Act of 1991, Congress amended 42 USC sec. 1981 by adding a new remedy section, 1981a. Without any reference to the EEOC filing deadline provided in section 2000e-5(e)(1), section 1981a(a)(1) directed:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 USC 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination * * * (42 USC 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

At the time this new damages remedy was enacted in section 1981a, Congress was presumably aware that this Court had already held that the statute of limitations for section 1981 actions would be the analogous state statutes, most of which are two or three years, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); and that a state

human rights agency's six month EEOC-type limitations period would be inappropriate in limiting section 1981 claims. *Burnett v. Grattan*, 468 U.S. 42 (1984).

B. Applicable Supreme Court Cases on Proper Approaches on Limitations Issues: This Court can either affirmatively adopt a period or rule of limitations, or eliminate one or more of those advocated by the circuits. Under the grant of power to this Court by 42 USC sec. 1988, the approach used to decide limitations periods and accrual rules in civil rights claims (sections 1983 and 1981) is to select one from an analogous federal statute, and only if one is unavailable, from state statutes. *Wilson v. Garcia*, 471 U.S. 261 (1985) ("First, courts are to look to the laws of the United States so far as such laws are suitable * * * . If no suitable federal rule exists, courts undertake the second step by considering application of state * * * law"). When deciding limitations periods and accrual rules under other federal statutes (including RICO, NLRA, and the Federal Tort Claims Act), this Court has usually engaged not in a process of selection, but one of explicit "elimination" from the diverse rulings of the circuits. *Rotella v. Wood*, 528 U.S. 554 (RICO); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (RICO); and *United States v. Kubrick*, 444 U.S. 111 (1979) (Federal Tort Claims Act discovery rule), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (declining to apply a state statute of limitations to NLRA claim in favor of analogous federal statute). Respondent urges this Court to use the affirmative adoption approach, and borrow the back pay two year period as the effective statute of limitations *for all money judgments under Title VII*. Alternatively, the Berry third prong discovery rule should be eliminated in affirming the judgment below.

C. Applicable Supreme Court Cases on Continuing Violation Doctrine and Discovery: Contrary to the arguments of the petitioner, this Court has applied the continuing violation doctrine in civil rights cases, and did not allow a discovery rule to bar recovery. These cases are antithetical to petitioner's restrictive approach. In *Havens*

Realty Corp. v. Coleman, 455 U.S. 363 (1982), a fair housing organization deployed "testers" to detect racial "steering" over a period of several years by the defendant. This Court rejected the defendant's argument that the civil rights action was time barred under § 812(a) of the Fair Housing Act, 42 USC § 3612(a), which requires that a civil suit be brought within 180 days after the alleged occurrence. Although five different specific incidents were alleged, four occurred earlier than the 180 days limitations, and the housing organization knew of the discrimination from the earliest testing. Adopting a continuing violation theory triggered by a last act rather than a discovery rule, the Court held at 380-81:

> Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, * * * [W]e therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), a state Extension Service previously divided into a "white branch" and a "Negro branch," were subsequently merged into a single organization, but, some disparities remained between the salaries of white and black personnel. Years later, some of the affected black employees sued under Title VII for back pay. This Court held that recovery could not be barred simply because the discriminatory salary structure existed even before Title VII was extended to state government employers in 1972. The Court termed the circuit court ruling to the contrary as "too obvious to warrant extended discussion", *id.* at 395, and held that: "Each week's paycheck that delivers less to

a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."

Similarly in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968), this Court rejected a limitations argument that an antitrust case must be filed within the prescribed limitations period, even though the damages repeated year after year. The Court held with a brevity that common sense yields:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. * * * Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

CONCLUSION

The respondent seeks a denial of the writ of certiorari both because the decision below is correct, and because the petition fails to present the range of necessary questions for proper review. Alternatively, if the writ is granted, the additional questions enumerated above should be ordered to be addressed by the parties.

Respectfully submitted,

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In the Supreme Court of the United States

UAL CORPORATION, DBA UNITED AIRLINES,

Petitioner,

v.

JOANNE FIELDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's brief, although captioned a brief in opposition, is in substance an acquiescence in the petition for a writ of certiorari. Most notably, respondent concedes that a deep and longstanding conflict exists among the lower courts regarding the application of the continuing violation exception to Title VII's limitations period. Br. in Opp. 8, 23-25. If anything, respondent seems to labor to show that the conflict is even deeper, and the issue even more important, than the petition contends. Perhaps so. Certainly the decisions of the last three months, since the petition was filed, reaffirm that this acknowledged circuit conflict cries out for this Court's resolution.

Respondent does take issue with certain aspects of our description of the record, with our framing of the issues, and with our contentions on the merits. None of those disagreements, however, warrants – nor is it clear that respondent even seriously contends that any of them warrants – denial of certiorari.

1. The circuit split over the proper application of the continuing violation doctrine in discrimination cases can be expected to persist until this Court resolves it. In the short period since the Ninth Circuit decided this case, it has reaffirmed its "related closely enough" test in *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. pending, No. 00-1614, and again in *McGough* v. *Lockheed Martin*, 2001 WL 275007 (9th Cir. Mar. 20, 2001) (unpublished). Since the petition was filed, other circuits have continued to apply alternative tests that are fundamentally inconsistent with the Ninth Circuit's approach. See, *e.g.*, *Hipp* v. *Liberty Nat'l Life Ins. Co.*, ___ F.3d ___, 2001 WL 575489, at *8 (11th Cir. May 29, 2001) (applying *Berry* v. *Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983)); *Davis* v. *Lucent Tech., Inc.*, ___ F.3d ___, 2001 WL 563780 (1st Cir. May 30, 2001) (applying the notice rule).[1]

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[1] In *Fitzgerald* v. *Henderson*, ___ F.3d ___, 2001 WL 588961 (2d Cir. May 31, 2001), the court considered the Title VII claims of a woman who

There is no doubt that the proper application of the continuing violation doctrine is an issue that arises with tremendous frequency in federal employment litigation. The lower courts have issued more than 50 decisions involving this issue in the past three months alone. Finally, there is no dispute that the question presented is an important one that affects millions of employees and employers and that affects the resources of state and federal fair employment agencies.

2. Although respondent concedes the certworthiness of the question presented, she nevertheless levies three challenges to the petition that merit a brief response. First, respondent contends that the petition misstates portions of the record below. Br. in Opp. 3-7. Second, she argues that the petition should be denied (or an order entered to brief additional issues) because the petition fails to "present the range of necessary questions for proper review." *Id.* at 30. Third, respondent argues that the Court should deny review because the decision below was correct. *Id.* at 8-25. None of those contentions warrants denial of the petition.

a. The brief in opposition purports to correct two misstatements of the record in the introductory section of the petition, neither of which is claimed to have any bearing on the substantive issues raised by the petition. In particular, respondent asserts that, contrary to the petition, she does not seek relief for sexual harassment incidents that occurred before February 15, 1993; instead, evidence regarding those early events was included in the record only as background evidence. Br. in Opp. 3-4. But the court of appeals understood respondent to be argu-

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experienced unwanted sexual overtures from her supervisor on a daily basis for nearly a year, followed by approximately two years of hostile treatment from the same supervisor when she spurned his advances. At the end of that two-year period, the plaintiff took an extended leave of absence and filed an administrative charge of discrimination. The Second Circuit held that the plaintiff could seek relief under a continuing violation theory for the instances of hostile treatment antedating the limitations period because of their frequency and their similarity to the timely incidents of unfair treatment. However, the court held that the unwanted sexual overtures were time-barred because they were not the subject of a timely charge and because they were qualitatively different from the supervisor's retaliatory behavior.

ing that "she is permitted to sue for previous acts of discrimination, not just for those that fell within the limitations period, because the conduct prior to July 14, 1994 was sufficiently related to subsequent events." Pet. App. 17a.[2] It is undisputed that all of the alleged sexual harassment incidents occurred before *March 1993* (Br. in Opp. 4), and that respondent's sexual harassment claim, dismissed by the district court as untimely (Pet. App. 72a), was reinstated by the court of appeals based on the continuing violation theory (*id.* at 28a).[3]

If respondent now wishes to waive claims that the court of appeals thought she was presenting and should be allowed to present, then petitioner of course has no objection. Nevertheless, it remains true that respondent is pursuing, and the court of appeals is allowing her to pursue, claims relating to incidents occurring on or after February 15, 1993, but before the 300-day period preceding the filing of her administrative complaint. Thus, the question presented by the petition remains in live dispute between the parties, as well as unsettled and important.

b. Respondent argues that the petition should be denied because it does not seek review of certain additional questions that were resolved by the court of appeals. Br. in Opp. I, 30. In her view, the Court should also be called upon to decide, among other issues, whether "discriminatory retaliation by coemployees may create vicarious liability for an employer that knowingly fails to abate it." *Ibid.* Respondent does not suggest, nor could she, that the Court must first resolve these other matters in order to reach the single question presented by

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[2] In addition, respondent concedes that, under the Ninth Circuit's approach to the continuing violation doctrine, she is entitled to present evidence regarding alleged acts of discrimination antedating the limitations period and to receive "relief for every act of groping tolerated by the employer." Br. in Opp. 9.

[3] Respondent also disputes that she asked United to prevent her alleged harasser, Chmelir, from bidding onto the same shifts that she was working. Br. in Opp. 5-6 (citing Pet. 5). According to respondent, she merely asked United to keep Chmelir away from her when the two were assigned to the same shift. Br. in Opp. 6. This factual controversy has no bearing on the question presented.

the petition. Although these additional questions may be of interest to respondent, the brief in opposition offers no reason why any of them merits review by this Court. Respondent does not assert that any of the issues are the subject of a circuit split, that the court below reached the wrong result as to one or more issues, or that any of the issues are important for some other reason.[4] Accordingly, respondent's additional questions need not be included in a grant of certiorari.

c. Respondent understandably attempts to defend the lower court's approach to the continuing violation doctrine. Br. in Opp. 8-25. A brief on the merits following a grant of certiorari, not a reply brief at the petition stage, is the proper place for an exhaustive rebuttal of respondent's arguments, but we note briefly some of the more obvious flaws in her position.

Section 706(e) is a statute of limitations, the essential purpose of which is to encourage the prompt filing of discrimination claims by foreclosing the prosecution of stale ones. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256 (1980) (recognizing that Section 706(e) deliberately limits the "protection of the civil rights laws to those who promptly assert their rights"). The *Berry* test and the notice rule of the First and Seventh Circuits require employees to act with dispatch upon suffering what the employees perceive to be unlawful discrimination, while at the same time affording relief to those who, in the exercise of reasonable diligence, do not immediately appreciate the wrongful nature of the treatment they experience. By contrast, the Ninth Circuit's approach permits employees, like respondent here, to preserve discrimination claims indefinitely until it becomes convenient to sue on them. A natural consequence of this approach is to encourage putative victims to endure discriminatory treatment for as long as possible in order to enhance the prospect of a substantial

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[4] Respondent may, of course, brief any issue that was argued below and would support the judgment below, even if it was not the ground on which the court of appeals rested its decision. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). It does not appear, however, that any of respondents' proposed issues would "preserve, and not * * * change, the judgment." *Ibid.*

damages award. This result is contrary to the remedial purpose of Title VII, which seeks the swift elimination of discriminatory practices from the workplace. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Respondent is also mistaken in her suggestion that this Court, like the court below, has allowed plaintiffs to obtain relief for time-barred acts of employment discrimination provided that the "last act" of unfair treatment falls within the limitations period. Br. in Opp. 9, 28-30. Respondent's reliance on this Court's discussion of the continuing violation doctrine in the antitrust context is particularly unavailing. The Court clarified in *Klehr* v. *A.O. Smith Corp.*, for example, that

> in the case of a "continuing violation," say a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e. g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." But **the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.**

521 U.S. 179, 189 (1997) (citations omitted, emphasis added); see also *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (emphasizing the public policy of "rewarding the swift" that underlies the Clayton Act's "accrual rule that 'generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business'"). The brief in opposition offers no policy reason why victims of employment discrimination should be allowed to recover for incidents that they knowingly failed to report to an administrative agency before the expiration of Title VII's limitations period.

Finally, the brief in opposition does not attempt to respond to our observation (Pet. 18, 20) that the continuing violation rule adopted by the court below is so indeterminate that it cannot be applied in a consistent manner. Under the lower court's approach, the district courts are vested with unlimited discretion to determine in individual cases which acts are "related closely enough" with respect to their subject matter and temporal proximity. The threshold of relatedness established by the court

of appeals, as exemplified by the case at bar, is a low one. Here, respondent was able to able to revive time-barred claims of sexual harassment involving a coworker by pointing to two discrete instances of alleged retaliation by her supervisor. In light of this result, it is difficult to imagine two separate acts of discrimination that the court of appeals would not find to be "related closely enough" for purposes of applying the continuing violation doctrine.[5] This boundless exception to Section 706(e) simply cannot be reconciled with the plain language of the statute, which defines the limitations period for Title VII claims "with precision." *Alexander*, 415 U.S. at 47.

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As this Court observed more than a century ago, statutes of limitations "are found and approved in all systems of enlightened jurisprudence." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). More recently, the Court recognized the important interests that are promoted by the limitations period incorporated into Title VII of the Civil Rights Act of 1964, including the importance of assuring repose when putative plaintiffs knowingly fail to assert their rights in a timely manner. See *Ricks*, 449 U.S. at 259. Yet the Ninth Circuit, in derogation of these principles, adopted a "continuing violation" exception to the Title VII limitations period that permits employees to resuscitate stale claims whenever the court deems them to be "related closely enough" to incidents within the limitations period. That formless exception is contrary to the text and purpose of Title VII, inconsistent with this Court's guidance regarding the interpretation of statutes of limitation, and at odds with every other circuit's approach to the continuing violation doctrine. Further review of the decision below is warranted.

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[5] Thus, although respondent is right (Br. in Opp. 7) that Judge Kleinfeld's dissent does not set out a legal framework comprehensively different from that of the court of appeals majority, the dissent nevertheless is instructive because it shows how out of step the result reached here – as well as the test applied, admittedly in conflict with the law of other circuits – is with this Court's jurisprudence.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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